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IN THE

Supreme Court of the United States

OCTOBER TERM, 1902.

J. L. HOWARD, ALIAS FRANK THOMPSON,
A. L. DALY, ALIAS GONEZ BONO, AND
H. D. HAWLEY, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

Brief and Argument for Plaintiffs in Error

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STATEMENT.

There are two cases before the Court involving these appellants and plaintiffs in error, numbered 312 and 313, respectively. The former comes up from the Circuit Court of the United States for the Eastern District of North Carolina by way of an appeal from an order of that Court remanding the petitioners and dismissing their petition for a writ of *habeas corpus;* the other from the Supreme Court of North Carolina on a writ of error.

Inasmuch as the questions involved in each case are cognate, and because of the poverty of the appellants, we have made but one brief and argument for both.

The appellants and plaintiffs in error were arrested, tried, convicted and sentenced at a Superior Court of

Guilford county, North Carolina, June Term, 1901, for a bare, unexecuted conspiracy to obtain money by false pretenses from one Paul Garrett, by the supposed means of what is vulgarly known as the "gold brick game." Briefly, the facts are that Howard appeared in the office of one Paul Garrett, a liquor merchant of Weldon, North Carolina, clad in the garb of a miner and affecting ignorance of letters and of ordinary affairs. He told Garrett that he had once, in Arizona, a partner named Andrew Garrett, who, some years before, had left him and gone east, and there died. Andrew had a brother, Peter, and Howard supposed P. Garrett (Paul) might be that brother. That before Peter left him, they had agreed, if either made a "strike," the other should share in it. That Howard had found a rich mine in Arizona, in which an Indian (Bono) had an interest. That they had mined it in a rough way and had taken out certain bars of bullion, worth about $36,000. The Indian had these at a camp near Greensboro; and they intended going East to sell the gold at the mint; to perfect their mining claim; and to buy machinery. Incidentally Howard had stopped over in the hope of finding the brother of his old partner, whom they wished to engage with them to aid in executing the above objects and also to keep their accounts, neither Howard nor the Indian being capable of so doing. After some negotiations Howard agreed with Garrett to engage him in this preliminary work at $25 per day, $10 as earnest money being paid down by Howard and accepted by Garrett; and for his future services to give Garrett the third interest in the mine reserved for the brother of Howard's deceased partner. An arrangement was then made for Garrett on the second day thereafter to meet Howard

at Greensboro, and go to the Indian's camp, there to inspect the bars of gold, take borings and have them tested, and to get the consent of the Indian to the agreement with Garrett. As Howard passed from Garrett's office, the latter called his clerk's attention to Howard, saying: He was "a genuine gold brick man." Nevertheless Garrett kept the appointment at Greensboro, but in the meantime sent one Mims, paying his expenses, to the authorities at Greensboro and arranged to trap Howard and the other plotters. On the way to the Indian's camp, Howard became alarmed and started to go back, but was urged on by Garrett and deceived by a lie of Garrett (312 Trans., 76). Arriving at the camp Garrett asked Howard to tell the Indian that he, Garrett, was the brother of Andrew Garrett, Howard's partner, another lie. Certain brass bars were then produced by Daley, who was disguised as an Indian, and at once the officers closed in and arrested the parties. A visiting card, bearing the name of Hawley, was taken from Howard, *after* the arrest. Returning to Greensboro, Hawley was arrested at the hotel, but not in the presence of Howard or Daley, and was asked if the card was his, but denied it (312 Tr., 93). A satchel or case was found in Hawley's room, the ownership of which he denied, containing certain assayer's blanks (312 Tr., 94), also bronzing liquid, commercial ratings of Bradstreet, and a letter addressed to "Harry," telling of his appointment to the Philadelphia mint. A hotel claim check was found on Daley's person; and, after the arrest, the authorities took the trunk from the hotel by attachment. This trunk contained (312 Tr., 102 et seq.) some maps, commercial reports, bronzing liquid, some other items, and twelve small packages of genuine gold borings. To the

introduction of the card in evidence, also the contents of case and trunk, also certain declarations of one or more of the parties after arrest, made out of the presence of others, objections were duly interposed, overruled, exceptions, and the points duly saved, assigned as error and presented to the Supreme Court.

Garrett thought there was a $20,000 reward in Virginia for these parties, and before the arrest he wrote concerning it to the Attorney General of that state (312 Tr., 88). After the arrest, Garrett went to his attorneys and caused a civil suit to be filed against the three parties arrested for $2,000 for an alleged breach of the contract to pay him $25 a day and the third interest in the mine. This suit was filed at 2 o'clock in the morning, and an attachment in aid sued out (312 Tr., 86, 87), verified under oath by Garrett, setting out that the defendants were indebted to him in that amount for the breach of the above contract (312 Tr., 86). Under this writ everything the prisoners possessed, except the clothes on their backs, was then taken (312 Tr., 103). On the criminal trial when the panel was in the box, and afterwards in the charge to the jury, the judge specially singled Garrett out for commendation; and of course defendants objected (312 Tr., 64, 119. See also dissenting opinion of Douglas, J., 313 Tr., 27). On the verdict of guilty, for this bare, unexecuted conspiracy, two were sentenced to ten years in the penitentiary, the third to seven years.

The Federal questions raised are that defendants below were denied the equal protection of the laws of North Carolina, they being citizens of the United States; that their trial, conviction and sentence were not due process of law; that their privileges and immunities as such citi-

zens were abridged, all in violation of the amendment to the Constitution of the United States.

The manner in which these questions were raised appears in the "Specification of Errors" following.

SPECIFICATION OF ERRORS.

A

The petition for the writ of *habeas corpus* sets out that Howard and Daley are citizens of Illinois, Hawley of New York, and all citizens of the United States; and that they are unlawfully detained by the warden of the State Penitentiary.

That they were indicted for a certain conspiracy, setting forth the first count.

That the acts so charged do not constitute any offense under the law, statutory or otherwise, of North Carolina.

That they moved in apt time, in the State trial court, to quash said indictment on the grounds that it was not due process of law; the trial denied them the equal protection of the laws; and that their privileges and immunities as citizens of the United States were thereby abridged; all in violation of the Federal Constitution. Which said motion was overruled.

That they then moved for a bill of particulars, in apt time. Which motion was also overruled.

That in its charge to the jury the Court refused, though requested, to charge on the presumption of innocence.

That they were convicted, and thereupon moved in

arrest, setting out the same Constitutional grounds. Which motion was denied, and petitioners sentenced, two of them to ten years, the other to seven years, in the penitentiary.

That they appealed to the Supreme Court of the State, where they urged the above Constitutional matters, but the Court affirmed the judgment.

That said indictment in truth charges no offense, that the alleged acts constitute no crime under the laws of North Carolina, and the State courts are hence without jurisdiction to try, sentence or punish your petitioners.

That the punishment is greater and different in kind from any ever heretofore imposed in said State for a like charge, and hence void because a denial of the equal protection of the laws in violation of XIV Amendment.

That said trial, conviction and punishment are hence each of them void as contrary to the said Constitutional rights repeating them.

This petition was duly signed and verified by petitioners, and the writ was ordered issued.

To this the Warden made return stating that he held petitioners by virtue of certain proceedings in the courts of North Carolina, setting them out, including the indictment, and decision and mandate of the Supreme Court.

That the Federal courts have no jurisdiction in the premises on *habeas corpus*, the remedy of petitioners being by way of writ of error.

That the punishment was not excessive, for the judge who sentenced them was in possession of the facts that Daly and Howard were charged with carrying concealed

weapons, and that they were charged with conspiracy in South Carolina and Iowa.

That the decision of the Supreme Court of North Carolina is final.

Signed and verified.

To this return an answer was filed elaborating the allegations of the petition and reiterating them, with the addition of the statute referring to the road law, hereinafter fully set out, which requires petitioners to have been sentenced to the road and forbids their sentence to the penitentiary, which latter is alleged to be in violation of the Constitution of the United States.

They deny they have cheated persons in other States, and if the Court took into consideration unfounded rumors and gossip *dehors* the record and in consequence thereof increased their sentence, such action was a denial to them of the equal protection of the laws and abridged their rights and privileges, in violation of the XIV Amendment.

Deny that the Warden's return is sufficient.

Signed and verified.

There was no evidence taken on the issues framed; but, on motion by the State, petitioners were remanded; and this appeal prosecuted.

In the writ of error the points are raised as stated in the petition as above set out.

APPELLANTS AND PLAINTIFFS IN ERROR WERE DENIED THE EQUAL PROTECTION OF THE LAWS, *because:*

1. The sentence was excessive and barbarous, such as had never before in the history of the state been inflicted in a conspiracy case; even when the criminal object of

the combination had been fully consummated. For example: It is five times greater than given for an executed conspiracy against the virtue of a young unmarried woman, the carrying out of which was practically a rape.

This question is raised in the petition for *habeas corpus,* in the traverse of the warden's return to the writ, and in the assignment of errors in this court (312 Trans. 5, 29, 53, 54).

2. The Supreme Court of North Carolina has decided that a sentence greatly exceeding in length of imprisonment that theretofore given for like offenses in that state is "cruel and unusual" within the meaning of the inhibitory provision of the State Constitution. If cruel and unusual, it must hence be a discrimination against appellants, and violative of the equal protective clause.

The point is raised in the petition, in the traverse to the return, and is assigned as error (312 Trans. 5, 6, 29, 54, par. 3rd).

3. The Statute of North Carolina provides that in all penitentiary sentences the convicted parties shall not be sent to the state's prison, but the court shall in its judgment order that they be put to work upon the highroads, provided the county in which the trial was had has a road law, except in certain specified cases. These defendants were convicted in Guilford County, which had then such a road law, and they were not in the excepted cases; yet they are now undergoing the harsher punishment in the penitentiary.

This point is raised in the petition, the traverse to the warden's return, and assigned as error in this Court (312 Trans. 6, 27, 54).

4. Howard and Hawley were discriminated against in this, that the law of the State requires all conspirators in the same combination to be punished alike; yet the two named received ten years and Daly only seven.

This point is saved in the petition, not traversed by the return, and assigned as error in this Court. (312 Trans. 4, 53.)

5. The State admits that the trial court increased the sentence because of gossip he had heard *dehors* the record. (312 Tr. 15, 31.)

B.

THE TRIAL, CONVICTION AND SENTENCE WERE NOT DUE PROCESS OF LAW, *because*:

1. The combination for which defendants below were tried was not an offense in North Carolina either by statute or at the common law. They were sentenced, therefore, in the absence of all law; and their punishment is as illegal as if inflicted by mob violence.

This point is raised in the petition, the traverse to the return, and assigned here as error (312 Trans. 3, 25, 54, Assgt. Sixth), and also in the writ of error in the motion to quash the indictment, in error assigned in the State Supreme Court, and error assigned in this Court. (312 Trans. 63, par. 7th, 123, par. 7th, No. 313, 6 Assgt. 1, pars. a, b, c, d.)

2. There was no statute of the State authorizing the infliction of this heavy sentence, and the action of the majority of the Supreme Court of the State was hence not the exercise of a judicial function, but was legislation, pure and simple.

This point is saved in the petition, not traversed by the return, and is assigned here as error, (312 Trans. 3, 54, par "fifth"); and in the writ of error, in the assignments of error in the State Supreme Court and in this Court. (312 Trans. 123, 313, Trans. 6, par. 4th.)

3. Such a punishment for such an offense has never heretofore been inflicted by the Courts of this country, Federal or State. It is hence arbitrary, capricious and void.

The point is raised as in A, 1, *supra.*

4. The sentence is so heavy and so out of all proportion to the offense as to transcend the "limits of those "fundamental principles which lie at the base of all our "civil and political institutions." It is an "arbitrary "deprivation" of liberty; it ignores the basic principle that all punishment should be proportioned to the crime; it shocks the conscience by its severity; it points to the conclusion that it was conceived in passion, and born of sectional hatred; and if persisted in, it would lead to retaliation between the States of our Union.

The point is saved as in the paragraph next above.

5. The sentence is opposed to the genius of our institutions as manifested by the legislation and decisions in the various States. The modern sentiment is opposed to judge-made crimes. When tolerated at all, small punishments only are permitted.

6. The trial Court refused, though requested, to charge on the presumption of innocence.

This point is saved in the petition, traverse to the return and in the assignment of errors in this Court. (312 Trans. 3 and 4. 26, 53, par. "third.")

7. The indictment is not due process of law because it charges no offense whatever.

BRIEF AND ARGUMENT.

When this case was called in the Superior Court of Guilford County, the defendants had no reason to believe that their trial would not be fair, or that the Court would violate any of the rights secured them by the Fourteenth Amendment to the Constitution of the United States. However much their expectations may have been disappointed in the conduct of the proceedings and in the sentence by the *nisi prius* judge; still they believed, and their counsel with them, that in the Supreme Court of the State their rights and the law would be vindicated. In the opinion of counsel, the errors committed on the trial were so many, so gross and so palpable that there was no thought of any other result than reversal. In part their opinion was sustained by the minority of the higher tribunal. Counsel had the right to rely on that Court to protect their clients in their constitutional rights, State and Federal. So relying, Federal questions were presented only perfunctorily *as* Federal questions by way of exceptions. They were urged in argument before the Court, as appears by the allegation in the petition, which stands uncontradicted. (312 Tr. 4 and 5.) But though they were not raised (with one exception) *eo nomine* as Federal, yet the errors relied on in this court were fully presented and argued in that tribunal. In the motion to quash the indictment it was alleged, among other matters, that the indictment charged no crime, either at common law or by statute, and that it was defective in being so vague as not to apprise defendants of the charge

against them. Exception was duly taken to the refusal to grant a bill of particulars; to the refusal to charge on the presumption of innocence; and to the excessive sentence. On appeal error was assigned in the State Supreme Court, among others, on the points just mentioned. In these errors are included most of the violations of the Fourteenth Amendment complained of in the petition for the writ of *habeas corpus*. It is manifest from a reading of the opinion of the Court that, no matter how the Federal questions might have been raised, nor how strenuously insisted on, the decision would have been the same.

We are aware of the general rule of this Court that ordinarily such questions should be presented in apt time to the State tribunals and in apt language; the reason for that rule being, as we understand it, that on *habeas corpus* the prisoner must be discharged altogether, if the petition be sustained, while on a writ of error, the plaintiff in error, in certain contingencies, may be sent back for a re-sentence. We submit, however, that if the contentions here presented be sound, the prisoners must be discharged, whether their case be here by *habeas corpus* or writ of error. This court has more than once permitted the *habeas corpus* proceedings and the writ of error to proceed concurrently. Ex parte Frederich, 149 U. S., 70; *Whitten* v. *Tomlinson,* 160 U. S. 242; *Markuson* v. *Boucher,* 175 U. S. 186.

Believing as we do that a monstrous injustice has been done, we appeal to this Court to rectify it, confident that "not the weight of a judge's finger shall rest" upon these men except by strict command of the law. We have nothing to say in commendation of them. That

they intended to get money through Garrett it were foolish to deny; but no crime has been legally charged against them and no crime has been proved against them. Rights secured by statutes and by Constitution were refused them. The blackest criminal has as strong a claim to the due and orderly administration of the law as the blessed martyr. No otherwise can a free country exist.

In this case attention is respectfully called to the various opinions rendered by the Supreme Court of the State. The Court consisted of five judges and there were four opinions. The majority opinion was rendered by Judge Clark, with whom concurred Faircloth and Montgomery, J. J., if the opinion of the latter be really a concurrence. "He thinks" that some of the remarks of the trial judge were "inappropriate and indiscreet"; "the "language of the statute may not have been violated, *but "its spirit certainly was"* (italics ours). See 312 Tr. 20. The main dissenting opinion is by Judge Douglas, concurred in as to result by Furches, C. J. This opinion is a vigorous dissent, and numerous fatal errors are pointed out, so great and so numerous, says this judge, that their "combination * * * renders it morally impossible "that they (the defendants) should have had such a trial "as they are entitled to by the 'law of the land.'"

An examination of the pleadings in No. 312 will disclose that the petition for the writ of *habeas corpus* raises practically all the questions to be submitted to this Court (312 Tr. 1 et seq.). In the return to the writ, the warden of the penitentiary traverses only one allegation of the petition, namely the charge that the punishment is greater than ever awarded in that State for a like offense (312 Tr. 14), saying that "the punishment is "not unusual, and is, as he advised, fully authorized by

"the laws of the state," etc. As to the manner of impanelling the jury, grand and petit, he says, while admitting the facts, that custom was followed. (312 Tr. 12, 13.) He justifies the heavy sentence by stating that the trial judge was in possession of various rumors, *dehors* the record as to the criminal history of defendants. (312 Tr. 14, 15.) Thus it appears that the petition remains substantially not denied. Under the rulings of this court, all allegations in the petition for the writ not traversed are admitted, if petition be verified as in this case. (See order of court 312, Tr. 7.) *Whitten* v. *Tomlinson,* 160 U. S. 231; *Kohl* v. *Lehlback,* 160 U. S. 293.

In the answer of petitioners to the return, the allegations of the petition are elaborated, and some new matter responsive to the return is added. No attempt was made by the warden to frame an issue of fact or to introduce evidence; and on motion, the prisoners were remanded. This motion was the equivalent of a demurrer to the answer of petitioners, and, on elementary principles of pleading admitted all facts well pleaded. See Church on *Habeas Corpus,* 2nd Ed. §§ 159, 160, 161 and cases cited.

The admitted facts, therefore, are the following: 1. That the trial court deliberately took into consideration gossip and rumors *dehors* the record, and increased the sentence in consequence thereof; 2. That the motion to quash the indictment and the motion for a bill of particulars were each denied; 3. That the prayer for an instruction to the jury on the presumption of innocence was denied; 4. That the Court, in effect, charged the jury that defendants were guilty; 5. That in argument

before the State Supreme Court the foregoing points were urged upon the Court as being in violation of the Fourteenth Amendment to the Constitution of the United States; 6. That the sentence was greater than ever inflicted for a like offense in the State; 7. That under the road law and the statute of the State, the *duty* of the Court was to sentence defendants to work on the roads of Guilford County, and not to the penitentiary.

These points, except 2, were not noticed in the opinion of the Supreme Court of North Carolina, and hence are taken to have been decided adversely to plaintiff in error, and against the Federal protection invoked.

With respect to the inhibitions of the Fourteenth Amendment, it makes no difference by what branch or instrumentality of the State government they are violated, the Federal Courts will protect the citizen of the United States in any event. *Chicago, B. & Q. R. R.* v *Chicago,* 166 U. S. 226; *Scott* v. *McNeal,* 154 U. S. 34.

The judgment being in violation of the Constitution is utterly void.

A.

THE DEFENDANTS BELOW WERE DENIED THE EQUAL PROTECTION OF THE LAWS.

1. *The sentence is more severe than ever inflicted in that State for a like offense.*

Pretermitting for the present the provision of the North Carolina Constitution relating to cruel and unusual punishments, we rest for the moment on the proposition that the sentence is more severe than ever inflicted in

that State for a like offense. It is equal to the maximum denounced by the Legislature of North Carolina for a conspiracy to overthrow by force the government or to levy war against the state!

In *State* v. *Powell,* 121 N. Car., 635, the alleged conpiracy was to procure a seventeen year old girl by false pretenses to leave her home for the purpose of prostituting her. The scheme was successful, and the girl was actually debauched. For this unspeakable crime the sole defendant tried was sentenced to *two years* on the roads. It appears from the report that the co-conspirator was Lulu Powell, presumably the wife of Marion Powell, who alone was tried. The crime was thus one of "peculiar atrocity"; the woman entering into the combination made it easier to lure the trusting girl to her ruin.

In *State* v. *Wilson,* 121 N. Car., 650, the scheme was the same, the false pretenses being a mock marriage, invalid by the laws of the State. This, too, was carried out, and the women were prostituted. The report shows the sentence only as to Wilson. The judgment recites that he had been previously indicted for shooting a man in the arm, breaking it, "without justification or provo-"cation"; that he had been indicted for carrying concealed weapons, pleading guilty to both charges and judgment suspended (it is intimated through malfeasance of the State's solicitor); that he was "a notorious violator of "the law and openly defies the law and its process" (p. 653). Under these circumstance, comparing the punishment inflicted on these appellants for their bare, unexecuted conspiracy, one would suppose that hanging, drawing and quartering would be the least Wilson could expect, and that he might congratulate himself to have

escaped the *"peine forte et dure."* However, he got *two years on the road.* From the recitals in the judgment above set out, the sentences of the other defendants must have been much lighter.

What a commentary are these two cases on the morals of a community which can complacently view such trivial punishments for such hideous crimes. We cannot forbear quoting in this connection from our brief in the Supreme Court of North Carolina:

"Shall it be said of this great State, among whose "founders were Monk, and Clarenden, and Shaftsbury, "whose first legislator was John Locke, whose early set- "tlers resisted, under Culpeper, the enforcement of the "odious navigation laws, anticipating New England a "full century in a revolt against tyranny, * * * "shall it be said of her, I say, that she has come to this: "that she is five times more solicitous to protect the paltry "dollars of the wine merchant Garrett than to guard the "virtue of her women! Or are we to infer that she has "one measure of punishment for her own citizens, though "they be 'notorious violators of the law and openly defy " 'the law and its process,' and another and harsher meas- "ure for the strangers within her gates?"

State v. *Jackson*, 82 N. Car., 565, was a conspiracy to charge a woman with "infanticide and to cause her "to be arrested, prosecuted and punished therefor." The defendants were sentenced to ten, eight and five years in State's prison, respectively, though as the Court say, p. 569, the crime was "one of peculiar atrocity in the "object aimed at and in the means contemplated and at- "tempted to accomplish that object." Judgment was reversed, because the *punishment was in excess of that per-*

mitted by the law as then construed by the court; and also because the law did not authorize different terms for different defendants. It should be noted that this case, besides being one of "peculiar atrocity," was also strictly within the Edwardian conspiracy statutes, hereafter to be examined, and contemplated the perversion of justice by perjury.

State v. *Mallett,* 125 N. Car., 718, was a conspiracy to defraud. Defendants were sentenced to two years in the county jail. (See *Mallett* v. *North Carolina,* 181 U. S. 589.)

Comparing this sentence with the punishments prescribed by the Legislature for the three statutory conspiracies known to the laws of North Carolina, we find the maximum for a conspiracy to abduct a child is fifteen years, R. C. § 974; the maximum for a conspiracy to embezzle funds of a railroad by its employees, and a conspiracy to levy war against the State is ten years. Laws 1870-1, ch. 103, § 2; Rev. Code, § 1107.

This Court has repeatedly said that the Fourteenth Amendment prohibits a "different or higher punishment "to be imposed on one than is imposed on all for like "offenses." *Re* Kemmler, 136 U. S., 436; *Caldwell* v. *Texas,* 137 U. S., 692; *Connolly* v. *Union & C. Co.,* 184 U. S., 540.

2. *The sentence is "cruel and unusual," within the meaning of the State Constitution; and hence discriminates against defendants below.*

In *State* v. *Driver,* 78 N. Car., 423, it was held that a sentence of five years in the county jail and a recognizance of $500.00 to keep the peace thereafter for five years for wife beating was "cruel and unusual," and the

case was reversed. The principle of this case is that where a sentence greatly exceeds the punishment inflicted usually in that State in like cases it becomes cruel and unusual and hence unconstitutional. This is a different meaning of the phrase from the construction put upon the same language in our Federal Constitution; but the ruling is exceedingly apposite to the case at bar. If the sentence is "cruel and unusual," it certainly comes within the inhibition of this Court as being a "different" and "higher punishment" than is usually imposed for like offenses *In re* Kemmler, *supra.*

It is worth while to quote one extract from the opinion of the Court in the Driver case to show just the attitude assumed in this connection. After stating the case and the constitutional provision, together with certain statutes, the Court refers to 3 Story on Const., § 1896, and to the fine of £30,000 imposed on the Duke of Devonshire by King's Bench for his assault on Culpeper (a fine dictated by the malice of James II.) and its review, after the Revolution of 1688 by the House of Lords; Judge Reade says: "Thus it appears, both by prece-"dent and by the reason of the thing, and by express "constitutional provision, that there is a limit of the power "of the judge to punish, even when it is expressly left "to his discretion. What the precise limit is cannot be "prescribed. The Constitution does not fix it, precedents "do not fix it, and we cannot fix it, and it ought "not to be fixed. It ought to be left to the judge "who inflicts it under the circumstances of each case, "and it ought not to be abused, and it has not been abused "(grossly) in a century, and probably will not be in a "century to come, and it ought not to be interfered with, "except in a case like the present, where the abuse is

"palpable. And when that is the case, then the sleeping "power of the Constitution must be waked up to pro- "tect the oppressed citizen. The power is there, not so "much to draw a fine line close up to which the judges "may come, but as a 'warning' to keep them clear away "from it."

3. *The penitentiary sentence was a denial of the equal protection of the laws.*

The statute of North Carolina provides: "Sec. 1. "That when any county has made provision for the "working of convicts upon the public roads, or when "any number of counties have jointly made provision for "working convicts upon the public roads, it shall be law- "ful for, and the duty of the judge holding Court in such "counties, to sentence to imprisonment and hard labor on "the public roads for such terms as are now prescribed "by law for their imprisonment in the county jails or "in the state prison, the following classes of convicts: "First, all persons convicted of offenses the punishment "whereof would otherwise be wholly or in part impris- "onment in the common jail; second, all persons con- "victed of crimes the punishment whereof would other- "wise wholly or in part be imprisonment in the peniten- "tiary for a term not exceeding ten years."

"Sec. 4. That in all cases where the judge presiding "shall be satisfied that there is good reason to fear that "an attempt to release or to injure any person convicted "of any of the offenses mentioned in section one of this "act, class second, it shall be lawful for the judge to sen- "tence such convicts to imprisonment in the penitentiary, "as is now provided by law: *Provided,* That no person "who has been convicted and sentenced on a charge of

"murder, manslaughter, rape, attempt to commit rape, "or arson, shall be assigned under this act." Law N. Car. 1887, p. 630. The act shall not apply to certain counties named, not mentioning Guilford County. The latter County adopted the road act Sept. 4, 1894. (312 Trans. 48, 49.)

On the plainest principles of criminal jurisprudence it was the duty of the trial court to sentence the defendants below to work on the roads, or else to recite in its judgment the reasons why he made the judgment a term in the penitentiary. The judgment should have contained a recital bringing it within the provisions of Sec. 4 of the act; otherwise the act itself might well be a dead letter.

4. *By reason of the unequal sentence, Howard and Hawley were denied the equal protection of the laws.*

The two named received a sentence of ten years in the penitentiary, while Daley received seven years. There is absolutely no difference in the guilt of the various defendants, if they were guilty at all. The evidence shows that Howard was the spokesman, Hawley was the assayer (his connection was of the very slightest), and Daley played the Indian. If these men were engaged in a conspiracy to cheat and defraud Garrett, then all are equally guilty and there are no degrees of culpability; but the trial judge capriciously gave a lighter sentence to one than to the others. This was in violation of the rule laid down in *State* v. *Jackson*, 82 N. Car., 565, and was one of the errors on which that case was reversed. In the opinion by Judge Clark in the case at bar no mention is made of this point, though it was urged in our brief and the Jackson case cited. It was probably one of very many exceptions which the learned judge, with-

out mentioning specifically, contented himself with saying they were "without merit," (Tr. 313, p. 18); an easy, if somewhat unsatisfactory, method of answering the argument of counsel.

5. *The Judge allowed the tittle-tattle floating round the Court-House, and dehors the record, to influence his judicial discretion, and to cause him to increase the punishment.*

This stands admitted by the State. Not admitted by failure to deny, but actually and solemnly alleged affirmatively in order to justify this oppressive judgment!

They were wanted in Iowa! They were wanted in South Carolina! And some busy Mr. Wheeler goes to the jail and recognizes them as having swindled him! (312 Tr., p. 15.) And where and to whom did he impart this discovery? Not under the sanction of an oath, nor under the penalty of cross-examination. Did he "sit at the ear" of the judge, "squat like a toad," and pour his venom in there? There was no hint or whisper, at the trial, of these various other conspiracies; there is nothing in the record about them; and they were simply so many stabs in the back, with no chance to defend. Did some assassin whisper in the judge's ear in the Powell and Wilson cases, perchance, that the victims there were only harlots, and hence two years or less would be punishment enough for their violation? It is not easy to write temperately about such a proceeding.

There is no law in North Carolina increasing the punishment of habitual criminals; and if there were it could not apply to extra-territorial crimes. There is no law in that State authorizing the Court to hear evidence of bad character to enhance the sentence; and if there

were, no such evidence was heard on the trial and defendants given an opportunity to meet it. It remains that the State expressly alleges that these heavy sentences were imposed because of information given to the Court *in secret* and in the absence of the defendants. It is true that the return alleges that "it appeared to the Court" that requisitions had issued and that a Mr. Wheeler identified defendants, etc. Counsel cannot mean that such facts appeared to the Court at the trial, *for they did not* in truth, and the record shows they did not. Defendants were wholly ignorant that anything of the kind was going on. It was simply an instance of the Dreyfus secret ***dossier***.

Finally, the inquiry is pertinent, What has North Carolina to do with punishing crimes committed in Iowa? Our impression is that Iowa would say she is capable of attending to her own criminals. And how monstrous, too, to enhance the punishment in this case because these men had committed offenses in other States. Would it avail them in mitigation to plead that fact hereafter in South Carolina?

It is insisted that this is a clear violation of the XIV Amendment in that it denied defendants the equal protection of the laws, and was not due process of law. The points are raised in the answer to the return (312 Tr. 31).

If such a thing can be tolerated to enable the Court to assess the punishment, why may it not be done to determine guilt or innocence? And would the latter be due process of law?

Jeffreys was known in many cases to get the pleasure of the King before forcing a conviction!

B.

THE TRIAL, CONVICTION AND SENTENCE WERE NOT DUE PROCESS OF LAW; because,

1. *The alleged offense was not a crime either at common law or by statute of North Carolina.*

It was conceded by the majority opinion that no statute of the State covered this offense; and, in order to convict, recourse must be had to the common law. The statute of North Carolina relating to the adoption of the common law is as follows: "All such parts of the com-"mon law as were heretofore in force and use within this "State, or so much of the common law as is not destruc-"tive of, or repugnant to, or inconsistent with, the free-"dom and independence of this State and the form of "government therein established, and which has not been "otherwise provided for in whole or in part, not abro-"gated, repealed or become obsolete, are hereby declared "to be in full force within this State." 1 Code N. C., 1883, § 641.

The proposition now urged upon this Court is that a combination or agreement to cheat and defraud was not a punishable conspiracy at common law. The statement can with all safety be made broader. There was no such offense as conspiracy known to the common law. The crime originated in certain statutes of Edward I., was amplified by statutory law in the time of Edward III., and subsequent reigns; but never had any existence, save by statute, in the English law, until well on in the Stewart dynasty, when the judges began to legislate in that behalf. Until that time, conspiracy comprehended only combinations to commit champerty, em-

bracery and maintenance; combinations falsely to appeal men of felony; and combinations among wool merchants to control the price of the staple. There were also statutes, mainly in Elizabeth's time, denouncing combinations among laborers.

The deduction from this proposition is that there being no law of conspiracy, statutory or common, in North Carolina covering this offense, defendants were simply tried by a mob and not by due process of law.

We have endeavored to show at great length in subdivision 7, *infra*, that the Federal Courts are not bound to follow State adjudications on any general principle of the criminal law known to the common law. If our argument in that behalf is valid and sustained by the precedents cited and by right reason, then it follows that this Court does not have to take the definition of the majority of the North Carolina Court in this case of a common law conspiracy, but is free to determine for itself what the term includes and whether or not there was such an offense at common law. If it should determine that the acts charged in this indictment were no offense at common law, the prisoners should be discharged.

(a) *The English Common Law of Conspiracy.*

The legal concept that it is a crime for two or more to combine to commit some act, though the object of the agreement is never carried out, or as the old books say, "tho' nothing be put in ure," originated, we believe, in the Anglo-Saxon Jurisprudence after the Conquest. It is not found in the ancient laws of Normandy, where one would naturally seek its origin. It is not in the Grecian nor Roman systems; nor in the Brehon laws; nor in the

early Germanic nor Salic laws; nor in any system of jurisprudence in ancient or medieval times, so far as we have been able, after diligent search, to ascertain.

Beginning with the Norman Conquest, we find no trace of it in England in the period covered by Dr. Bigelow's admirable collection of cases, "Placita Anglo-Normannica," from A. D. 1066 to A. D. 1195; nor in *Leges Henrici, circ.* 1118. There is no hint of it in the Select Pleas of the Crown, Selden Soc. A. D. 1200 to A. D. 1225; nor in the 2,000 cases in Bracton's Note Book, from A. D. 1200, to *circa* A. D. 1240 (the case, No. 479, indexed under "conspiracy," in Prof. Maitland's Ed. is not a conspiracy); nor in Glanville, who wrote between 1187 and 1189; nor in Bracton's treatise, "The Crown and Flower of English Medieval Jurisprudence" (1 Pollock & M. Hist. Eng. Law, 206) written about 1250 to 1258; nor yet in Britton nor Fleta, both about 1290.

It is a strong presumption that no such offense existed at common law, that, in all the materials now at hand covering the period, of more than two centuries after the Conquest, we find no single suggestion of it until we come to the statutes hereinafter examined. The presumption becomes well nigh indisputable when we see numerous cases touching accessories in the same and earlier periods. "Anglo-Saxon law knows the slayer by rede, as well as the slayer by deed." 2 Pollock & M. 509.

In Bracton's time, he who advised the killing was a slayer himself; but Bracton also gives another maxim, that unless the party has *acted* on the advice or command there is no crime. "*Ubi factum nullum, ibi forcia nulla.*" Bracton, ff. 142, 139. The rule in Bracton's time in cases where a party of men under a leader committed a

crime, such as murder, robbery or the like, was for the leader to be tried first, and, if acquitted, his associates went free. These latter were called his *"alia"*; the title "conspirators" is never used. See illustrations in 1 Select P. C. (Seld. Soc.), cases 4, 9, 76, 84, 155, 164, 197.

It is hard to reconcile this common law maxim with the doctrine of 27 Ass., 34, 44, where the conspirators were punished, though nothing was put in execution; unless indeed the law of conspiracy was something which came after Bracton's time, by way of a statute; as, for example, 33 Edw. I., in which case the whole matter becomes luminous.

A word as to the situation of that period, disclosed by our histories, will, we think, strengthen the argument.

After Edward I. had become accustomed to his throne, he undertook numerous judicial reforms. It was not until then that the great courts are becoming definitely separate; and from that time dates the sharp struggle between the King's courts and the local courts for jurisdiction. The barons resented the ever increasing interference with their own tribunals. "This is my warrant, my masters," said Earl De Warrenne, throwing down his sword in the face of the King's Bench. When Edward proved too strong for open resistance, fraud, chicanery, maintenance were used to evade or to bring into contempt the new courts. At this time also the ordeal was passing, and the jury had arrived. For a time its struggle for existence was precarious. The new process by indictment was just devised, and crime was becoming to be recognized as an offense against the King, and not merely a private wrong. The situation was critical. We can now to some extent appreciate why Edward and his im-

mediate successors passed statute after statute defining and punishing maintenance, champerty and conspiracy, and providing civil remedies therefor. They were necessary to prevent the judicial reforms from being swept away. We can see, too, from the historical standpoint why it is an anachronism to say that the offenses named were, before that time, known to the common law. How could a jury be embraced before there were any juries? Were a man's compurgators, conspirators? How could there be maintenance in a trial by witnesses? In truth these offenses grew out of the trial by jury, and beyond doubt the writ of conspiracy was invented to be used against persons abusing the new process of indictment. See 3 Stubbs, Const. Hist. 575 *et seq.;* 1 Pollock & M. ch. VII.; 2 id., 539; Thayer, Predim. Treat. on Ev., ch. 1; 2 Social England, 32; 2 Reeves Hist. Eng. Law. 126, 457.

The statutory enactments clearly reflect the situation as we know it historically.

By 3 Edw. I., ch. 25 (West. 1, 1275) champerty by the King's officers was prohibited; and by ch. 28 of the same act any "clerk of any Justicer or sheriff" was forbidden to maintain "quarrels of matters" depending "in "the King's Court."

In West. 2, c. 49 (1284, 13 Ed. I.) champerty and simony by the chancellor, treasurer, justices, any of the King's Council, clerks of chancery and of the exchequer, and justice or other officer, or any of the King's house, clerk or lay, were prohibited; and offenders "punished "at the King's pleasure, as well he that purchaseth as he "that doth sell." This, Coke said, was merely an extension of West. 1, c. 25 (*supra*), because it was doubted

whether the word "King's officers" (*nul ministre le roy*) would include persons of such eminence as those named in West. 2, without special mention.

By Cap. 12 West. 2 (13 Ed. I., 1284) it was recited that inasmuch as many persons maliciously procure false appeals to be made by appellors who are pecuniarily irresponsible, it is therefore provided that if the appellee be acquitted in any case, and the appellor be found unable to respond in damages, then the justices shall enquire by whose abetment or malice the appeal was commenced: and if it be found by "the same inquest that any man "is abettor through malice," he shall be distrained and mulcted at suit of the acquitted party and imprisoned.

In the twentieth year of his reign (1292) a statute entitled "Statutum de Conspiratoribus" prohibited champerty and maintenance and provided that such as were "attainted of such emprises" should be imprisoned for three years and fined at the King's pleasure. A civil writ was also provided and the form thereof given. This writ ran to any who would "complain himself of con- "spirators, inventors and maintainors of false quarrels "and brokers thereof and brokers of debates"; while the form of the writ given provided that anyone who would give surety for prosecution "of a plea of *conspiracy* and "trespass according" "to our ordinance" should have the writ.

In c. 10 of *Articuli super Chartas* in the twenty-eighth year of this reign (1300) it was enacted that, in addition to the writ out of Chancery theretofore provided for plaintiffs against "conspirators, false informers, and evil "procurers of dozens, assises, inquests and juries," such writ should run from either court and from the Justices

of the Assises on circuit. This statute, so far as conspirators were concerned, merely facilitated the getting of the civil writ, and gave jurisdiction thereof to King's Bench and the justices in eyre in addition to the chancery.

By the next chapter (28 Ed. I., c. 11) the offense of maintenance was extended to embrace all persons whatsoever, whether officers of the King or not, excepting, of course, attorneys and next friends.

In 33 Edw. I., A. D. 1305, we find the famous "Ordi-"nance concerning Conspirators," as follows: "Con-"spirators be they that do confeder or bind themselves "by oath, covenant or other alliance, (1) that every of "them shall aid and (bear) the other falsely and mali-"ciously to indite (or cause to indite) or (2) falsely "to move or maintain pleas; (3) and also such as cause "children within age to appeal men of felony whereby "they are imprisoned and sore grieved; (4) and such as "retain men in the country with liveries or fees for to "maintain their malicious enterprises; and this extendeth "as well to the takers as to the givers; (5) and stewards "and bailiffs of great lords, which by their seignory, "office or power undertake (to bear or maintain quar-"rels, pleas or debates that concern other parties) than "such as" touch the estate of their lords or themselves. "This ordinance and final definition of conspirators was "made and accorded by the King and his Council in "his parliament in the thirty-third year of his reign."

"Champertors be they that move pleas and suits, or "cause to be moved, either by their own procurement, or "by others, and sue them at their proper costs, for to have "part of the land in variance or part of the gains."

By 1 Edw. 3, § 2, c. 14 (1327) it is provided that "because the King desireth that common right be admin-"istered to all persons, he commandeth and defendeth" that no persons, high or low, "shall take upon them to "maintain quarrels * * * to the let and disturb-"ance of the common law."

By 4 Edw. 3, c. 11 (1330) it is recited that divers people and great men "have made alliances, confederacies "and conspiracies to maintain parties, pleas and quarrels," hence it is provided that either bench and the justices of assises shall take inquests at suit of the King or of parties and determine of "such maintainers, bearers and con-"spirators" and champetors.

By 18 Edw. 3 st. 1 (1344) process of exigent is given against absconding "conspirators, confederators and "maintainors of false quarrels."

20 Edw. 3, c. 4 (1346) is in affirmance of sts. 1 and 4 preceding, with some additional details.

By 27 Edw. 3, st. 1, c. 1 (1353) it is provided among other things that "maintainors" shall be put out of the King's protection, their lands and goods forfeit and their bodies taken and imprisoned.

By 27 Edw. 3, st. 2, c. 25 (1354) it is forbidden for merchants to make "conspiracies, confederacies, &c., and "ill device" for disturbance, impeachment, &c., of the staples on pain of death. This is the only statute in the long line relating to any other matter of conspiracy except to pervert justice.

By 1 Ric. 2, c. 4 (1377) none "shall henceforth take "nor sustain any quarrel by maintenance * * * upon a grievous pain" prescribed by the act.

By 7 Ric. 2, c. 14 (1383) it is recited that "grievous "complaint is made of maintainers of quarrels and cham- "petors" and therefore statutes 1 Edw. 3, st. 2, c. 14; 4 Edw. 3, c. 11; and 1 Ric. 2, c. 4, are confirmed.

32 Hen. 8, c. 9 (1540) makes elaborate provisions against maintenance, champerty and embracery, reaffirming all statutes made "concerning maintenance, cham- "perty, and embracery or any of them."

An examination of the foregoing statutes shows that for a period of considerably more than one hundred years the two great Edwards and Richard II. were repeatedly legislating against the crimes of champerty, embracery, maintenance and conspiracy; and that in their minds the four offenses were but different phases of the same general crime, namely the crime of perverting justice. It is difficult at this late date to realize the intensity of the struggle between the King and his Courts on the one side, and the feudal lords on the other, from the accession of Edward in 1272 to that of Henry VIII. in 1509; yet without such realization we cannot fully understand the legislation and judicial decisions of that period on the topic now under discussion. It was the struggle between law and order on the one side, and semi-anarchy on the other; between the jurisdiction of the King's Courts, and the lawlessness of the barons; between the centralization of power in the King and his parliament, and the fiercely claimed independence of the feudal lords. These crimes struck at the very vitals of the growing nation. Either English Courts were to become supreme and England a homogeneous world power, or she was to split up into little principalities. The issue remained doubtful for five centuries after the Conquest, and it was not until

the strong hand of the Tudor dynasty took the helm that the Ship of State sailed out into the broad waters of Empire.

The first reported case on our topic in English law occurred in 1351, and was error sued out of King's Bench to reverse a judgment given in Circuit on a presentment of conspiracy. The charge was that a man and his son had conspired to imprison another until he should pay a fine. After passing on a technical point, the Court says: "And moreover because the principal matter of "the conspiracy alleged is not conspiracy, but rather dam- "age and oppression of the people. Wherefore we reverse "and annul the judgment." Y. B. 24 Edw. 3, p. 75.

In 1354, in the Articles of Inquest, we find: "Note: "that two were indicted of confederacy, each to maintain "the other, whether their matter was true or false, and "notwithstanding that nothing was put in ure, the parties "were held to answer, because this thing is forbidden by "the law." (*Defendu en ley*, i. e., criminal.) 27 Ass., 44. See, also, almost precisely the same language in 27 Ass., 34. This is the first recorded case, so far as extant documents go, in which a conspiracy was criminally punished.

Next in order of time is the case of 1365 in which one sought to get a civil writ against several for having conspired to forge a deed of release and to put the same in evidence, which they did, whereby the petitioner for the writ had lost his case; and Thorp said: "And do "you pray that you have a writ of conspiracy on the "ground of an evidence? You shall not (have it)." Y. B. 39 Ed. 3, p. 13 a.

Be it observed that the civil action was much broader

than the criminal, as shown by the Statutes 20 and 28. Edw. 1. It included a remedy of damages against those who falsely caused one to be indicted of a trespass. (See 3 Ass., 13.) And hence, if no civil action lay for conspiracy, *a fortiori,* no indictment would lie; though unfortunately many courts have cited cases of civil action as precedents in the criminal cases. To be a little more specific, we mean by this that there were more *subjects* enumerated by the statutes for which the writ lay than there were on which indictments could be predicted. Thus, as stated, an action lay for a conspiracy to commit a trespass, in its medieval sense (quite different from its modern meaning), yet it was not indictable. On the other hand, sometimes, prior to 1611, an indictment might properly be brought when the writ would not lie; but this, as we shall show hereafter, was because the conspiracy had not been completed, and hence the plaintiff had not suffered any damages, in the medieval sense.

In 19 R. 2 F. Briefe 926 (1395) several brought a writ of conspiracy against J. and others. The writ contained the allegations "confederated" and "conspired." The writ was held bad, because *two* could not join as plaintiffs in a writ of conspiracy, the injury being several. "Rik. (Rickhill, Justice, spelled Rickel, Rikel and "Rickhill.) The imprisonment of one cannot be the im-"prisonment of the other, by which you take nothing by "your writ," etc. Gascoigne (afterwards immortalized by Shakespeare in Henry IV.) as counsel, made the point of improper joinder of plaintiffs, on which the case turned. In another place in the book the case is stated: "Two were indicted, &c., and they brought a writ of "conspiracy. The writ was they confederated and con-"spired, also, &c. *Wad.* A man will have a writ of

"conspiracy although they (i. e., the conspirators) do "nothing but confederate together, and he will recover "damages. And they can be indicted of this also. But "for this that their grievance is several and they brought "their writ in common, it was abated." The case is reported in Bellewe, Cas. temp. Ric. 11, at pp. 80 and 108.

Next we come to the case of *Sydenham* v. *Keilway* (1574), which is reported as follows: "Popham, Ch. J., "cited a case to be resolved by all the Justices, Anno. "16 Eliz. *Sydenham* v. *Keilway*, that where two conspire "to indite one falsely, and the party is not indicted be- "cause the jury had not sufficient evidence, but returned "an *'Ignoramus'* upon the bill, no (writ of) conspiracy "lies, because he never was indicted nor acquitted; yet "he may be indicted upon conspiracy at the common law "for this false conspiracy and misdemeanor, which is "punishable at the common law." Cro. Jac. 7 (Case 9).

Ameridith's Case, Moore 562 (1599) was an information in Star Chamber for a conspiracy, under the second paragraph of 33 Edw. 1, by certain of Ameridith's tenants, who agreed among themselves to contribute to suits brought and to be brought respecting certain freeholds and copyholds of inheritance. And because they had no common interest in the lands so held "they were fined "for the combination, and maintenance and the taking of "obligations, one from the other." Otherwise would it have been if "by custom in which they all participated in "common" their interest had been mutual.

The case of Lord Grey of Groby, Moore, 738 (1607) in Star Chamber was one in which the lord complained of his tenants because they joined in the expense of a

petition to the King on the Customs of the Manor. The Court took the distinction between the case in which all tenants were interested in the same custom; and the case where the question was one of tenure. In the first they might share the expenses and not be guilty of the offense of maintenance; but not in the second; because the tenure of one is not the tenure of all. And because the tenants claimed a custom that all the copyhold tenures descended for life to the eldest son of the deceased copyholder, or to his daughter, in default of a son; the Court, by Popham, held that it was "an illegal combination."

This review exhausts, we believe, the cases on conspiracy from the Conquest to the Poulterers' case (1611).*

From these cases a distinction is to be noted as having been taken by King's Bench, which was perfectly plain to the Courts until the eighteenth century is reached, but which has been greatly misconceived since.

The language of all the statutes requires the object of the conspiracy to have been completed; or, if not the precise language, yet the necessary implication; and this was the construction adhered to by the Courts in cases of conspiracy, properly so called. That is to say, before several could be appealed or indicted of a conspiracy to indict or appeal a man, the latter must have been acquitted *legitimo modo*. But in 27 Ass. 34, 44, a new doctrine was announced; namely, that nothing need be "put in ure" as to these conspiracies, for the agreement to be

*We say we believe the review to be exhaustive; but those who are familiar with the Year Books well know how defective are their indices. On these, however, we have necessarily relied; except as to the Book of Assises. This we have examined page by page. There are in it some very interesting conspiracy cases deciding various questions: whether the commissioned Justice or the indictors could be conspirators; the right to try one conspirator in the absence of the others, and the like. But none of these touch the matter under discussion, namely: What is the essence of the offense? They are all, however, either for maintenance or for falsely indicting for felonies.

indictable; and they took this distinction; a conspiracy is divided into two parts; (a) the agreement falsely and maliciously to &c., (b) the execution of that agreement, as by an appeal or an indictment of the victim of the conspiracy. After having proceeded as far as (b) the conspirators were safe from an indictment for a "conspiracy" (note the word) unless and until the victim were found "not guilty" on the merits. It would not suffice for him to save himself on a point of law or even a successful plea of self-defense in an appeal of murder; he must be *legitimo modo* acquitted. But suppose the parties had agreed to maintain each other, true or false; here surely must be an offense within the mischief of the Statute. And so the Judges made the division above indicated; and said this false "confederacy" (a) was a crime; or, as we would say now, the completion of it was but the "overt act" of the "confederacy," and the "false confederacy," without this overt act, was punishable at *Common Law*. They did not for one moment conceive that *every* "false confederacy" was punishable at Common Law, but only those confederacies which were the agreements precedent to the specified *Statutory conspiracies*.

The distinction was well understood by Coke, and is especially insisted on by him in his comments on and summary of the Poulterers' Case. Holt, C. J., observes the difference in the Best case (1691) *infra;* and it was not until well on in the 18th Century that the distinction was ignored; then text writers and some courts seized upon the word confederacy, dislocated it from its connection, and tortured it into the meaning that "confederacy," that is "combination," that is "conspiracy," was a common law offense. Thus by an easy transition they

concluded that *all* combinations were denounced as crimes by the Common Law.

The proposition is so important that we shall try to restate it. By various statutes passed chiefly by Edw. 1 certain specific combinations were made criminal, and designated by the Ordinance 33 Edw. 1 as "conspiracies." But by the letter of, or by necessary implication from, the previous statutes relating to the same offenses, before conspirators could be punished for their crime, the crime itself must have been completed by the full carrying out of the objects of the combination; that is, the suit must have been maintained and lost by the conspirators, or the victim of the appeal or indictment must have been tried and acquitted *legitimo modo* of the false charge. Then, and not until then, under the statutes, were the conspirators liable criminally. Now this did not adequately meet the evil, and so the Judges of Edw. 3 carved out of those statutes a lesser offense, namely, a "confederacy;" and they punished the combination, if it were discovered in time, before it had fully ripened into the conspiracy. But these punishable "confederacies" were only the combinations denounced by 33 Edw. 1; those and none others. (Adding of course the wool merchants' conspiracy, 27 E. 3, s. 2, c. 25.)

The text writers before Coke's time give no hint of conspiracies outside of the statutes.

Staundford, who was a Common Pleas Judge in Elizabeth's reign, published or wrote his Pleas of the Crown in the latter half of the 16th Century.

He gives quite a disquisition on Conspiracy, mostly taken up with the civil writ. He has not the faintest notion that there is any common law offense outside of

the Edwardian Statutes; but asserts the writ lay at common law as well on an acquittal on an *appeal*, as on acquittal on an *indictment;* and this notwithstanding West. 2, c. 12. This is a very different thing from saying that conspiracy is a common law crime; for as soon as the Statute makes a combination to do an act a crime, then one who is injured subsequently by that combination would, probably, at common law, have his civil remedy, on the principle of *"ubi jus, ibi remedium."* At any rate Staundford sticks to the Statutory offense.

The earliest text book mentioning conspiracy in its expanded sense is Termes de la Ley, which contains, in the editions subsequent to the Poulterers' case, a condensed statement of that case and Coke's glosses thereon; but the edition of 1579 contains only a copy of 33 Edw. 1, some references to statutes on Conspiracy of Edw. 3. Hen. 5, 6 and 7, and a short account of the villainous judgment. In the edition of 1629, the matter of the Poulterers' case is indicated as new since the previous edition.

Rolle's Abridgment refers only to 33 Edw. 1 and to the case of 27 Ass. 34. Fitzhebert, a Judge of Common Pleas, is to the same effect in his *Natura Brevium* written in 1519.

In all save one of the precedents contained in the *Register Brevium* the allegations relate to agreements to cause the plaintiffs to be arrested or indicted on some false criminal charge; the exception being a conspiracy to assert title in a dwelling belonging to M., by which M. had been brought before the court and despoiled and impoverished by the litigation; a case of maintenance, within 33 Edw. 1. This last precedent concludes in stating the conspiracy, as do the others in which the

formal conclusion is given, to have been *"against the form of the Statute"* or King's Ordinance. Reg. Brev. "De Conspiratione," p. 134, Ed. of 1687. This strikes us as practically decisive of the question.

Thus we find in the four centuries from 1200 to 1611 an unbroken, uncontradicted line of authorities; of forms of writs; of opinions of text writers (save only the "Fables of the Mirror") agreeing on the proposition that 33 Edw. 1 was indeed the "final definition of Conspirators" and that beyond its content conspiracy did not exist.

Blackstone did not have the slightest notion of endorsing the modern interpretation of Hawkins' text, *infra*. In Bk. 4, p. 136, he defines conspiracy as an agreement to indict an innocent falsely of a felony, who is accordingly indicted and acquitted. This goes away back to Edw. 1 and to the Book of Assises of Edw. 3. No mention is made of Hawkins, though the latter wrote sixty years before Blackstone. Neither does Judge Blackstone indulge in any theories about common law conspiracies; but then, as we all know, Blackstone was totally lacking in imagination and he actually tried to talk about the law as it really existed, not as doctrinaires thought it ought to be.

Hawkins published his Pleas of the Crown in 1717 and in Vol. 1, Ch. 72, he states that "there can be no doubt but "(sic) that all confederacies whatsoever wrongfully to "prejudice a third person are highly criminal at common "law"; a radical departure indeed from settled doctrine, if we are to consider "confederacies" as equivalent to "conspiracies"; but intelligible and proper if Hawkins was keeping in mind the distinction made by the early

judges between the two crimes. If he meant the former then he is absolutely unsupported by a single case cited by him. He cites 27 Ass., 34, 44; Grey of Groby's case; Poulterers' case; the Bastardy cases (Timberly and the others); Starling's case; Best's case; and *Saville* v. *Roberts,* all of which are herein elsewhere stated, save *Saville* v. *Roberts,* reported in Holt, 150; 1 Ld. Raym. 374; 5 Mod., 394, 405; 1 Salk., 13; and Carth., 416 (1699). This was case in the nature of a writ of conspiracy for falsely conspiring to indict Roberts for a riot, whereof he was acquitted. Plaintiff recovered damages below, and judgment was affirmed in King's Bench. Lord Ch. J. Holt drew the distinction between *case* in the nature of conspiracy and the ancient writ of conspiracy, saying the latter would lie only where the conspiracy had been to indict of a treason or felony. Hawkins' later editors add the cases of Cope, Tailors of Cambridge and Edwards.

If, however, Hawkins had in his mind the old distinction between "confederacy" and "conspiracy," his statement of the law is well enough; for by it he could have meant only to say that all "confederacies" wrongfully to indict or cause to indict, falsely to maintain pleas, &c., as defined in 33 Edw. 1, are highly criminal at common law. These "confederacies" are truly "wrongfully to "prejudice a third person,"but the "prejudice" is only that prejudice which is defined in the Edwardian Statutes. So Thorp understood it in 1354; so Coke in 1611; and so, we believe, did Hawkins in 1717. Either that, or Hawkins is open to the criticism of stating a proposition not only unsupported by his authorities, but in flat contradiction of them and baldly untrue. Modern enthusiasts on common law conspiracy may take either horn.

Having misunderstood the ancient distinction between confederacy and conspiracy, the advocates of the common law theory seek to strengthen their position by appealing to the great name and reputation of Lord Coke. Coke certainly has said, more than once, that champerty, maintenance and conspiracy were offenses at common law independent of Statute, and these statements have usually been deemed conclusive of the law; so that in this century a lawyer attacking them for the first time comes dangerously near the line of ridicule. He may quote Lord Campbell's statement as to Coke's ignorance of and contempt for science and literature; he may quote Sir James Fitzjames Stephen's characterization of Coke's disorderly mentality, his inability to analyze the commonest words, and his inaccuracy with respect to his authorities; and he may point out with Prof. Maitland (the greatest living authority on medieval English law) Coke's credulity with respect to alleged ancient law writers; and still the almost irresistable weight of that great name will crush the venturesome critic. 1 Campb. Lives C. J. 333; 2 Stephen Hist. Eng. Cr. Law, 205, 206; Introd. to Mirror, 7 Seld. Soc., p. 10.

This much only can we say: We have before us all the material accessible to him and very much more; we have the advantage of three centuries of evolution of the human mind, with all that that implies in the way of freedom from superstition, analytical habits of thought and an immensely broadened intellectual horizon. It rests with each man to think for himself.

But note: Coke nowhere states the offense in broader terms than 33 Edw. 1, as more fully shown below.

We have asserted that prior to Edw. 1 the legal con-

cept of a crime of combination, without any further act, existed in no other system of jurisprudence. It did not get into the English system, from the Roman Law through Azo to Bracton; nor did it arrive with William from Normandy; no student from Bologna, Paris, Pisa, Padua or Salamanca brought it back to England; nor did it come down from the Anglo-Saxons. Coke did not know it as a common law doctrine from the cases, for it is not in the books now extant and in print, containing many more precedents in the formative period of the common law than he had access to. This we submit is a strong argument against its common law origin.

If it was already a known offense at common law in Edward's reign why did that law giver legislate so much and so often on the subject? That was not an era of making acts of the legislature "while you wait." An ordinance was a thing of moment, a thing thought about; and yet on these topics this "English Justinian" caused to be enacted eight separate statutes; more than on any other subject in the whole range of his legislation. If all this (and much more as some will have it) existed in the breasts of his Justices, why trouble himself and the new-born parliament with the matter?

Coke cites the Mirror and the Mirror only, 2 Inst. 383-4, 562. As well might a lawyer nowadays cite the Comic Blackstone. It would certainly raise no presumption that his proposition is true; whatever else it might bring about. In the note on page 383 of 2 Inst. will be found the origin of Lord Coke's error as to the common law nature of conspiracy. He says that he has read that Henry I. mitigated the pre-existing severity of the common law as to conspiracy, and comments for half a page on the matter. He cites the Mirror, de Hom., c. 4. The

passage referred to will be found in the Sel. Soc. Ed. of that book at p. 136; and there the author of the Mirror tells of this law of Henry I. which Coke cites, but which no one else in modern times has ever seen. Now if there is one point on which the author of the Mirror is strong, it is history and ancient legislation. True, his historical statements and his alleged legislative acts were mostly never heard of by any other person, and do not exist in any printed book or known manuscript now extant; but what of that? Has he not the same right to compose histories as Geoffrey of Monmouth or Baron Munchausen? He tells how Alfred the Great hanged forty-four of his judges in one single year for their false judgments. He even gives the names of the judges and the name of each case in which the false judgment was rendered (p. 166). Some of these names are Scandinavian, and some Norman, but that is a mere detail. The book was written between 1285 and 1290, and we know of the great judicial scandal of 1289. Horn, the supposed author of the Mirror, seemed to be a crank on the subject of "unjust judges," and fills a large part of his treatise with denunciations of them. It appears also that the trial by jury was in full blast in Alfred's time. The Mirror says so, pp. 166 *et seq*. There is also some wonderful news about the laws of Leuthfred and Thurmod (pp. 107, 152), and jury trials in their time, whenever that might have been. Nobody else ever heard of those law givers; but that also is a detail, perhaps thrown in, as the playwright says "to "add verisimilitude to an otherwise bald and uninteresting "narrative."

The Mirror has in it a good deal of literal transcript from Bracton; and here, it is needless to say, its author speaks law. He also tells us some "common law." For

example: A landlord cannot distrain his tenant's movables for rent in arrear; leases for more than forty years are void; rent reserved, in excess of one-fourth the annual value of the land, is illegal. The Mirror, 7 Seld. Soc. 129, 75.

We have devoted some space to the Mirror, for as an authority, except when otherwise corroborated, it is worthless; and its author simply a romancer with a hobby. If my Lord Coke was deceived by a plain liar, then it is neither fair or lawyer-like to use his name to bolster up the fraud.

But although Coke insists on the common law origin of conspiracy, champerty and maintenance, he was as far from subscribing to the modern doctrine of "common law "conspiracy" as was William de Thorp. He says a conspiracy is an agreement falsely to appeal a man of a felony (3 Inst. 143) and he does not go one single step further. Neither do Rolle nor Fitzherbert nor Staundford. They leave that to later text writers and judges.

But if conspiracy was a crime independent of statute, here is a curious thing. In 13 Ed. 1 c. 12 we find a complaint that certain men procure straw men to indict, and then, if there is an acquittal the "abettors" go free. And so the King will have the abettors punished. And how? Not by the villainous judgment, but by "imprisonment "and restitution of damages." This is strange. If there were a common law of conspiracy, one would say there was no need of this statute; it would only have been necessary to appeal the first appellor and his abettor of a conspiracy, and on conviction hale them to prison, raze their houses, dig up their trees, deprive them of their free law and their children of their inheritance. 27 Ass.,

59; 47 Ass., 11, the "villianous judgment." That is a comprehensive enough punishment surely. And, moreover, why provide that the acquitted appellee should have his damages, if the writ of conspiracy already existed? The more rational view is that when the evil was invented, Edward met it with a statute; as it grew, so he strove the more to abate it. The Stat. 13 Edw. 1 being inadequate he passed the 20th; that still being faulty he enacted the 28th and then the 33rd.

And yet again, every student of English history knows how jealously the staples, especially wool, were guarded, how much they were legislated about, how valuable to Henry III. and Edward I. for purposes of revenue; yet we read nothing about conspiracies to engross the staples, nor to export them, nor to injure them until 27 E. 3 when the statute was passed punishing conspiracies and confederacies relating to them; and at once thereafter in the Articles of Inquest in 27 Ass. 44; we find the justices ordered to enquire concerning merchants who conspire to affect the price of wool. Yet had conspiracy been a common law offense would we not rather expect to find some mention of it, as touching the staple, before that time?

Coke says one proof of its common law origin is that no punishment was denounced by 33 E. 1, and yet we find cases in which the villianous judgment has been suffered, this being a common law punishment. 3 Inst. 143. But that was the ordinary judgment of attaint following every felony unless otherwise provided. It was so in Glanville's time one hundred years before the Ordinance of Conspirators. Glanv. bk. 7, ch. 17.

These arguments, it is true, are largely negative; but

what shall be said of the two express decisions that it is no conspiracy to agree to imprison a man till he shall pay a fine, nor to agree to forge a deed and put the same in evidence? The former implies an assault and battery and extortion of money; the other, while at that time forgery of a private seal or deed was a minor offense, necessarily implies the perversion of justice by indirect means. Y. B. 24 E. 3, 75; Y. B. 39 E. 3, 13a. While forgery of the King's seal was treason, yet common forgery is punished rather incidentally in course of civil actions by imprisonment. Bract. N. B. case 934. Actions for fraud by forgery seem to be founded on 1 Hen. 5, c. 3; see 2 Pollock & M. 540. It is not until 5 Eliz., c. 14 (1563) that the offense is made a felony.

Fairly considered these decisions mean that it was not a conspiracy at common law to combine to commit a crime, even though the agreement, in the language of Hawkins, may be "wrongfully to prejudice a third per-"son."

Lastly, the Statute of 33 Edward I. says concerning itself that it is the "final definition" of conspirators. The original version is *"Ista ordinatio et finalis deffinicio "consp. &c."*

The rule with respect to statutes declaratory of the common law is that if they are made in the "affirmative "without any negative, expressed or implied" they do "not take away the common law." 2 Inst. 200.

The modern notion with many is that outside of the Edwardian Statutes there is a great mass of common law conspiracy which may be drawn on as the tastes or prejudices of courts may suggest. But the statute expressly provides that its definition is "final," or in the original,

"finalis." Finalis is a post-classical adjective, the primary meaning of which has reference to "boundaries"; only secondarily does it connote an ultimate point of time. See Papin, Dig., 10, 1, 11. Such too is the meaning of the English "final." Had Edward meant final in point of time, he should properly have used "last" or "ultimate" which imply succession, while "final" respects the completion of the object. Crabb's Eng. Syn. tit. "last."

Can it be said that there is no "negative implied" in this expression? If it is "final," if its boundaries are fixed, if the object (the definition) is completed, how can it be said that there is anything left beyond and outside of the statute touching the same subject matter? Certainly, Coke, to whom these moderns appeal, never for a moment imagined a conspiracy outside of the Statutes. True, he speaks in Poulterer's case of conspiracies among wool merchants in support of his argument that the *confederacy* is punishable without any execution, but he was well aware of the statute of 27 E. 3, s. 2, c. 25, making it a crime for merchants to conspire concerning wool and the staples; for he sets it out and comments at large on it in 3 Inst. 95, 195.

He says: "Conspiracie is a consultation and agree-"ment between two or more to appeale or indict an inno-"cent falsely, &c."; and he sums up his understanding of the Poulterer's case thus: *"Nota,* reader, these *confeder-"acies,* punishable by law, before they are executed, ought "to have four incidents: 1. It ought to be declared by "some manner of *prosecution,* as in this case it was, either "by making of bonds or promises one to the other. 2. It "ought to be malicious, as for unjust revenge, &c. 3. It "ought to be *false* against an *innocent.* 4. It ought to "be out of *court* voluntarily" (italics ours). Certainly

all this does not get very far away from Edward's definition. Yet he is constantly appealed to as authority for the proposition that an agreement may be a criminal conspiracy, though neither end nor means be criminal.

We come now to celebrated Poulterer's case, decided in Star Chamber in 1611. 9 Rep., 55.

This is made to father all the modern judge made law of conspiracy, and hence it is worth while to state it fully.

One Stone had incurred the enmity of certain poulterers in London; and accordingly, for revenge, they conspired to indict him of a capital felony. They caused him to be arrested and bound over by a Justice of the Peace to the grand jury. Evidence was given by the conspirators before the grand jury, and that body returned the bill "ignoramus." Whereupon Stone sued out his writ of conspiracy in Star Chamber and the question was, did the writ lie where the party appealed had not been regularly acquitted (*legitimo modo acquietatus,* as the books say). It was held that the bill was maintainable. Coke, in commenting on this decision, cites Sydenham's case and admits that the action does not lie unless the party be indicted and *legitimo modo acquietatus;* then he refers to the criminal prosecution in 27 Ass. 34, 44; then to item 6 of 27 assises 44, directing inquiry of conspirators who agree falsely to indict *or* acquit (should be "and"); then to conspiracies among wool merchants; and then to the case in 19 R. 2, br. 926, in which the dictum occurs that the writ will lie though nothing be put in execution. This argument does not justify, on the authorities, the conclusion of Star Chamber in the main case; for, sifted down, there remains the express decision of King's

Bench in Sydenham's case that the writ does *not* lie till after acquittal, and opposed to it only the *dictum* of Wadham in the case 19 R. 2.

However, Coke was seeking to justify the usurpation of jurisdiction by his beloved Star Chamber. He began sitting there himself some fifteen years later, and was noted for his high-handed and oppressive acts, as a Star Chamber judge. (See 1 Campb. Lives C. J. 305.)

Thus far the cases and the statutes show the following:

1. That it was a criminal offense by various statutes to conspire: (a) to indict falsely; (b) to commit embracery; (c) to commit champerty; (d) to commit maintenance; (e) to disturb the price of the staples.

2. That, in its criminal aspect, "conspiracy," properly so-called, could not be punished until the object had been completed; as, e. g., until the appellee of a felony had been acquitted, *legitimo modo.*

3. That, in its criminal aspect, men might be punished for a "confederacy" which was the agreement preliminary to the *statutory* "conspiracy," though nothing had been put "in ure"; this latter being a common law offense, separate from the "conspiracy"; which was but the final overt act of confederacy.

4. No civil action lay by the appellee until after he had been acquitted *legitimo modo;* this upon the doctrine of Bracton; *"ubi factum nullum, ibi forcia nulla."*

5. That there is no syllable in extant books (except in the discredited Mirror) or manuscript of any other or different doctrine or of any other or different conspiracies, from 1066 to the Poulterers' case in Star Chamber, in 1611, overruling Sydenham's case (1574) in King's Bench.

6. That there is express authority that it was no crime to conspire to forge a deed of release and put the same in evidence. Nor was it conspiracy for two to combine to assault and imprison a man to force him to pay a fine or ransom. Y. B. 39 E. 3, 13a; Y. B. 24 E., 3, 75.

It is manifest, therefore, that the Star Chamber decision in Poulterers' case not only overruled Sydenham's case, but that it marks a new and dangerous departure from the previous law. The departure is in itself not great, even with Lord Coke's rather free comments; for he strictly limits conspiracies to statutory offenses; but it opened the doors of Star Chamber, and soon a crowd of litigants pressed through, with the result that the law of conspiracy began rapidly to enlarge.

Let us see how the historian of that tribunal viewed the work. In Hudson's treatise on the Court of Star Chamber (2 Collect. Jurid. 104, 105) we find the following language: "I will conclude the particular offenses which "I shall speak of with this great offense of *conspiracy* "rarely heard of in former times, but in our age grown "frequent and familiar. And herein some questions have "arisen; as in the case betwixt Rochester and Solm it "was questioned, whether if the party is *legitimo modo* "*acquietatus*, he may sue in this Court (Star Chamber) "for conspiracy? for Sir Edward Coke would have main- "tained, that after his acquittal he was to prefer his in- "dictment at the Common Law, where conspirators were "to have their villainies judged. But the Lord Egerton "did gravely confute that opinion, and open the jurisdic- "tion of this Court, manifesting that notwithstanding "the party might have his indictment, yet that excludeth "not the court of jurisdiction: for in all cases of force

"and fraud an indictment lieth at the common law; yet "this Court will proceed for the King also. * * * "But when the party is indicted, and not *legitimo modo "acquietatus,* then can no conspiracy lie, as it was ad- "judged in Daniel Wright's case. And therefor in the "case of *Baker* v. *Hall* and Alderman Lumley and others "for prosecuting an indictment against him upon the "Stat. 3 H. 7 for taking a woman against her will and "marrying her, which indictment he avoided by error. "and upon hearing it was adjudged that he could not "prosecute a conspiracy. Otherwise it is if the party be "never indicted, and that either the malice of the adver- "sary cannot prevail to have the indictment found, as it "was in the Poulterers' case, or the plot be discovered "before it came so far, as it was in the case of Sir An- "thony Ashley. In both these cases conspiracy will lie "in this Court; and *yet no action or indictment will lie "at the common law, unless the party be indicted, yea, "and acquitted also."* (Ital. ours.) "Thus then out of "these judgments it appears, that this Court hath juris- "diction in all cases of conspiracy where the common law "hath any, and *in divers cases further than the common "law."* (Ital. ours.)

In a note to this treatise it is stated over the hand of Finch (Ch. J. of C. P. 11 Car 1) that Hudson was "one "very much practised, and of great experience in the "Star Chamber and my affectionate friend." The book was written about 1625.

Here, then, is one fruitful source of error which had tended to mislead our courts. Think of American judges following Star Chamber precedents; "Star Chamber methods" having been the synonym of all that is abhor-

rent to free institutions since the settlement at Jamestown; a court which expressly held it was not bound by common law. Hallam says of its judges that they "sat, "like famished birds of prey, with keen eyes and bended "talons, eager to supply for a moment, by some wretch's "ruin, the craving emptiness of the exchequer." 1 Hall. Const. Hist. 443.

The greater the truth, the greater the libel is good Star Chamber doctrine; why not follow that worthy old principle to replenish the exchequer. (Hudson l. c. 102.) Why not fine a few jurors £3,000 each, as was done by Star Chamber in Throckmorton's case. (Hudson l. c. p. 72.) Or punish (by fines, of course, with lopping off ears as incidents) for breaches of *proclamation?* (Hudson, l. c. 107; Hall, l. c. 441.)

Another source of fruitful error of American courts, has been the rulings of the Court of the Exchequer, which by 38 H., 8, c. 39, had jurisdiction to punish, at discretion, all trespasses, deceits, negligences, defaults, contempts, offenses and other things in which the king should be the only complainant; and that King, Henry VIII.

Finally, when Star Chamber was abolished in 1641, King's Bench took over an undefined portion of its jurisdiction. Lord Mansfield said so, and added, *Jones* v. *Randall,* Lofft, 383, that King's Bench was "the general "censor and guardian of the public manners." We know of no court in this country which has dared to assume such powers.

Yet we find the decisions of all three of these courts cited in this country indiscriminately, for the more part, long after 1607 when they, in any event, can be persuasive only, and often with reckless disregard of the fact that

the English decision is predicated on some express statute which, after the manner of English judges prior to 1800, is not cited in the opinion. All that seems to be necessary is to find a case in point on the facts and then blindly follow it. Take *Le Roy* v. *Starling*, 1 Sid. 174 (1665), for instance. Some brewers cut the price of beer and were fined 300 marks each for doing it; fined for competition (think of it), because the Court feared Charles II. would lose his revenue. That is the blunt English of that case. Yet you will find it cited and approved by court after court in this country, with endless twaddle about the "public mischief" and the like. There was no public mischief about it. A profligate king was squandering his revenues on his vices and a subservient court sought to keep him in funds without the aid of a Parliament.

And the foregoing completes the survey of the English law on our topic up to and shortly after the fourth year of James I.; the year of the first settlement in Virginia, 1607; the year at which most of our states put the statutory limit of their adoption of the common law. Subsequent to that date English precedents are persuasive merely; they are "no more than the opinions of respecta-"ble lawyers, on the other side of the Atlantic." *Cathcart* v. *Robinson*, 5 Pet. 264; *Comm.* v. *York*, 9 Mete. 93; Sen. Spencer in *Lambert* v. *People*, 9 Cow. 578, 590; *Bowie* v. *Duval*, 1 Gill. & J. 175; *Stump* v. *Napier*, 2 Yerg. 45.

A cursory examination of those latter authorities, however, will conduce to the better understanding of our own cases.

In Timberly and Childe (or Kimberty), 1663, re-

ported in 1 Sid. 68; 1 Lev. 62; 1 Keb. 203, 254, the conspiracy was to charge one with being the father of a bastard child. On motion to quash the indictment on the ground that the charge was cognizable only by the spiritual courts, and hence a common law court had no jurisdiction of a conspiracy to prefer such a charge; Twisden J. said the charge was inquirable by the Justices of the Peace. The motion was overruled, and so later was the motion in arrest.

In a similar case in 1674 the same court stayed the judgment on the information, after conviction. *Green* v. *Turnor*, 3 Keb. 399. This because the conspiracy was to extort money and not to charge with an offense.

In 1691, the Court, while Holt was Chief Justice, held it to be a criminal conspiracy to agree to charge one with being the father of a bastard, though such charge was cognizable only in the spiritual court, and though no charge was actually made in such court. *Queen* v. *Best*, Holt. 151; 1 Salk. 174, 2 Ld. Raym. 1167.

These cases are within the letter of the Edwardian Statutes, for the agreement is to prosecute before some court, though it may not have been a court of common law; also they tend to pervert justice, and are hence obnoxious to the numerous maintenance statutes.

An extension of this doctrine, which, though not strictly within the letter, is yet within the mischief, of the old statutes is found in that class of cases punishing all combinations tending to pervert justice by indirect means; as for example, to influence the Court by false affidavits respecting repairs of roads; to procure the marriage of a chancery ward; to steal a chancery ward; to buy off witnesses; to impersonate a man and marry in

his name, in order, afterwards, to raise a specious title to his property.

Rex v. *Mawbey et al.*, 6 T. R., 619 (1796).
Rex v. *Locker et al.*, 5 Esp., 107 (1804).
Wade v. *Broughton*, 3 Ves. & B., 172 (1814).
Reg. v. *Hamp. et al.*, 6. Cox, C. C., 167 (1852).
Rev v. *Robinson*, 1 Leach, 37 (1744).

A clear departure from ancient doctrine was established by that line of cases holding the combination to commit any crime to be punishable; as, e. g., to obtain money for procuring a public office; to poison horses; to poison; to forge; to steal; to induce an apprentice to injure his master's goods.

Reg. v. *Pollman et al.*, 2 Campb., 229 (1809).
Rex v. *King et al.*, 2 Chitty R., 217 (1820).
Maudesley's Case, 1 Lew., C. C., 51 (1830).
Reg. v. *Brittain et al.*, 3 Cox, 76 (1848).
Reg. v. *Taylor*, 25 L. T. (N. S.), 75 (1871).
Rex v. *Cope*, 1 Stra., 144 (1719).

A departure more radical still is to be noted in those cases declaring criminal all combinations to commit acts violative of public decency or public morals. These proceeded on the theory that the Court of King's Bench was *custos morum*.

Rex v. *Delaval et al.*, 3 Burr., 1434 (1763).
Reg. v. *Haslam et al.*, 1 Denison, 73 (1851).
Reg. v. *Howell et al.*, 4 F. & F., 160 (1864).
Nisi Prims.

Which is not a common law principle, but a clear arro-

gation of jurisdiction by King's Bench, on the authority of Lord Mansfield.

An early case (1674) started the courts off on another tangent, and became the standing precedent for perhaps the largest class of so-called criminal conspiracies of modern times. We mean Thode's case. (Reported 1 Vent., 234; 3 Keble, 111.)

As the case is reported in Ventris, it is stated to be an information for a conspiracy to entice J. S. to play and to cheat him with false dice; and this was done, whereby he lost £70. Thode came in, pleaded, and was found guilty; the others came not. Motion in arrest was overruled, and "Wylde said the difference was where the 'vil-"'lianous judgment' was to be given; and where the "conspiracy was laid only by way of aggravation, as in "this case."

The distinction is very well, if it were meant thereby that Thode and his pals were indicted for a *cheat* accomplished by cogged dice (which was an indictable offense at common law) and the allegation of conspiracy was added merely to aggravate the charge, the substance of which still remained the cheat; in which event it is not a conspiracy case at all. And this is certainly the ruling of the Court. The indictment is not preserved, and so the point must remain to be determined by the language of the opinions. As reported in Keble the case is certainly that of a cheat and not a conspiracy. We transcribe the report in full.

"*Dominus Rex* v. *Thode and Brothers Bennet & Ton-*"*son*, 3 Keble. 111 (24 Car. 2, B. R.). Information "for enticing Wingfield to play with Thode and deceptive "putting false dice on him and won 70 l. in gold, Bennet

"is found not guilty, the rest have not yet pleaded, and "only Thode found guilty, and Saunders excepted in an "arrest of judgment, that being all by way of conspiracy "one alone cannot be guilty, but *per curiam* on an action "upon the case for deceit, *conspiratione inde Habita* one "may be convicted alone, but when its action upon the case "*quod conspiraverunt,* one alone cannot be convicted; but "here being no pleading by the rest, nor no default by "the plaintiff, judgment may be given against one. So "where it is that they did conspire to get the party found "guilty to play with W. and that he deceptive cheated at "play, its well enough, which the Court agreed on, F. N. "B. Tit. conspiracione, but the parties agreed to try it "as (to) the brother."

This is a case of a cheat at common law, with false tokens, to-wit: the cogged dice, and the conspiracy is only by way of aggravation (a very common pleading in the 17th Century); and so it is not a precedent for conspiracy at all, though very often cited as such.

But whether the Thode case was a true conspiracy or not, it has been largely accepted as having established the doctrine that combinations to cheat, where the means are neither false tokens nor false weights nor false measures, are criminal conspiracies, and punishable, though the cheat never be effected and though such a cheat consummated by an individual is not an offense. *Rex* v. *Wheatley,* 2 Burr., 1125. Some of these conspiracies are, *Rex* v. *Brisac,* 4 East, 164 (1803); *Rex* v. *Gill,* 2 B. & Ald., 204 (1818); *Rex* v. *Hamilton,* 7 C. and P. 448 (1836). This doctrine is generally repudiated in the United States. See *infra.*

Some American courts have cited the case of the Jour-

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neymen Tailors of Cambridge, 8 Mod. 10 (1721), as an authority that a combination to do an unlawful act is criminal, though the act, if done by an individual, is not punishable. There were statutes making it criminal for tailors and certain other artisans to combine to raise wages. (2 and 3 Edw. 6, c. 15; 5 Eliz., c. 4.) In this case, however, the indictment did not conclude against the form of the statute; but when that point was raised the Court said the gist was the conspiracy, and so the crime was an offense at common law; which is sound under 27 Ass. 34, 44. The Court then proceeds to say: "A conspiracy of "any kind is illegal, tho' the matter about which they con- "spired might have been lawful for them or any of them "to do, if they had not conspired to do it;" citing Tub-women's case. This last mischievous declaration was *obiter* merely, and is absolutely unsupported in authority, but it has done its evil work in corrupting the law. We say that it was proper for the indictment to conclude against the peace, etc., for that the conspiracy, i. e., confederacy, was a common law offense. A moment's consideration will show that this in no manner contradicts our argument against common law conspiracies. Edward I. defined certain acts as conspiracies. Now, the judges said in 27 Ass. 34, 44, that though "nothing be put in "ure," yet was a crime complete on the agreement. That is, where two agreed to maintain each other's quarrels true or false (a thing within the statute), though they did nothing more, that was a crime; or as we now express it, the crime was complete on the meeting of the minds. This is common law doctrine. Now in the Tailors' case the statute denounced combinations to raise wages, and at once the common law doctrine attached, and the combination to raise wages became indictable as a confederacy.

though "nothing be put in ure." This is a very different thing from saying that it was a crime at common law to combine to raise wages, for it was no such thing. It may be well doubted if the Court ever made the obiter remark in the report. Sir William Burrows said of that series of reports (Modern) it was a "miserable bad book;" and again when 8 Mod. was cited: "The Court treated that "book with the contempt it deserved, and they all agreed "that the case was wrong stated." *Rex* v. *Williams,* 1 Burr. 386; *Rex* v. *Harrison,* 3 Burr. 1322, 1326.

A case of doubtful authority was decided by King's Bench in 1783, in which several were indicted for a combination to "impoverish" the prosecutor (probably a master tailor) "by indirect means," the means not being further set out. In holding the indictment sufficient, Lord Mansfield said for the Court that while an individual might sell his goods for what price he pleased, yet several might not combine to hold up prices. *Rex* v. *Eccles,* 1 Leach 274.

In *Rex* v. *Turner,* 13 East 228, Lord Ellenborough, commenting on the Eccles case, said it was determined on the ground of restraint of trade; but Lord Mansfield's language would rather indicate that it involved a disturbance of the market. If it was decided on the ground of "impoverishing" an individual it is opposed to Starling's case. To combine to disturb prices, however, was an ancient statutory offense. (See 3 Inst. 196, 95; 27 E. 3 s. 2c. 25.)

A unique case (but one now often cited) is *Le Roy* v. *Starling.* 1 Sid. 174 (1665), sometimes called the Tub-women's case, in which certain brewers were indicted, because they conspired to "depress the gallon trade;" where-

by they would impoverish the farmers of the King's excise; whereby they would be unable to pay that chosen vessel of the Lord, Charles II., his revenues, which he so greatly needed for affairs of state and other *affaires*. The case was several times argued before the King's Bench, and it was urged that it was no offense "to depau-"perate others with intent to enrich one's self, as to sell "commodities at a cheaper rate" (i. e., competition). But the verdict of guilty was sustained and defendants fined, on the theory that to "depauperate" the farmers would render them unable to pay the King. Subsequent English judges have usually become explanatory over the case. See remarks of Holt, C. J., in Daniel's case, 1 Salk. 380; 6 Mod. 99. The Bench at that time was not at all apt to decide in favor of the subject against the King. Kelynge, an ignorant buffoon, was a member. He was later impeached and got off only by an abject apology. He is chiefly remembered now for his obscene rhyme perpetrated from the bench: "Magna charta, magna farta." A judge guilty of such an indecent remark concerning the Charter of Liberties of his country could hardly be expected to protect the rights of the people against the prerogative.

And finally we come to the proposition that a criminal conspiracy is an agreement to do an unlawful act, or a lawful act by *unlawful* means. Comparing that with 33, Edw. 1, we submit it is pardonable in the practicing lawyer to indulge in some Benthamistic remarks on "Judge-"made law." In *King* v. *Parnell*, 14 Cox. 508, P. and others were indicted for a conspiracy to impoverish landlords by persuading tenants to withhold their rent. Lord Fitzgerald, in summing up to the jury, quoted the above antithesis, and said it was "plain and clear" that an agree-

ment to commit any wrongful act was indictable. "If," said his lordship, "a tenant withholds his rent, that is a "violation of the right of the landlord to receive it; but "it would not be a criminal act, * * * but if two or "more incite him to that act, their agreement so to incite "him is * * * an offense. * * * It is a crim- "inal offense where two or more agree to do an injury to "a third party, * * * though that injury if done by "one alone of his own motion, would not be in him a "crime or an offense."

(b) *The Common Law of North Carolina as to Conspiracy.*

To establish his theory of a common law offense of conspiracy, Judge Clark in the case at bar cites and relies largely upon *State* v. *Buchanan*, 5 Har. and J. 317. This is commonly called the leading American case on criminal conspiracy. The opinion written by Judge Buchanan contains a cloud of precedents, and impresses the casual reader with the conviction that it is a learned and perhaps an unanswerable disquisition on the topic in hand. A careful investigation of the authorities cited discloses a startling, nay, a shocking, condition to the lawyer accustomed to pay proper deference to the courts of the land. Without attempting to characterize that decision, we will review the precedents invoked by the writer of the opinion and let them be the commentary.

The case was a prosecution of certain officials of the Bank of the United States at Baltimore for a conspiracy to defraud the bank. There was a demurrer to the indictment, which was sustained below and the State appealed. On reversal the case fizzled out on the trial on the merits. There were eminent counsel on both sides.

Luther Martin drew the indictment; and Wirt (among others) appeared for the State; while defendants were represented by Pinckney, Winder and Raymond.

After a review of the authorities, Judge Buchanan sums up the law as follows: "That every conspiracy "to do an unlawful act, or to do a lawful act for an illegal, "fraudulent, malicious or corrupt purpose, or for a pur- "pose which has a tendency to prejudice the public in gen- "eral is at common law an indictable offense, though noth- "ing is done in execution of it, etc."

Let us see how this startling conclusion is worked out.

Judge Buchanan affects to believe that the statute of 33 Edw. 1, the "Ordinance of Conspirators," is merely declaratory of *a part* of the common law, which existed when it was passed; and that outside of its terms a great body of conspiracies existed which could be drawn upon to suit the predilections of the Court. His first point is that the act is a mere definition and prescribes no punishment. The answer to that is that in statute after statute in the preceding thirty years the various offenses named in the ordinance had had penalties affixed to them: and besides, for every felony the law prescribed the "villainous "judgment." Next he quotes 3 Inst. 143, in which Coke says the statute is merely declaratory, the reason adduced being that conspirators could be punished by the villainous judgment, which was a common law punishment. The answer to this is that that penalty was the ordinary judgment in every attaint. Next he says, "who doubts * * * "that a conspiracy to commit any felony is an indictable "offense." To which it may be answered that there never was in England a single conviction for any conspiracy outside of the statutory conspiracies from 1066 to 1665.

the Tubwomen's case, a period of six centuries, though there were numerous cases within the statute during that time. William de Thorp, one of the greatest of the Judges of Edward III., doubted it, nay, more, *denied* it. In Y. B. 39, E. 3, 13 a. (1365), one sought a writ of conspiracy against several because they had combined to forge a deed of release and put it in evidence in a former suit, whereby the petitioner had lost his case; and Thorp said: "Do "you ask a writ of conspiracy on the ground of an evi- "dence? You shall not (have it)." Coke doubted it, for in 3 Inst. 143, he defines a conspiracy to be an agreement falsely and maliciously to indict an innocent of a felony, and he does not go one step beyond that. Blackstone doubted it for he defines the crime just as Coke defines it. 4 Com. 136.

Next he says that the statute is not prohibitory, and hence the common law still stands.

Observe that Judge Buchanan quotes the ordinance in full, save the last line, "this ordinance and *final* definition, "etc." The original is, "*Ista ordinatio et finalis deffinicio.*"

Finalis, as we have stated above, refers to "boundaries" and only secondarily to a period of time. In other words, Edward meant to put the limits to conspiracies. Here clearly is Coke's "implied negative." We repeat, Coke thought that 33 E. 1 defined *all* the then conspiracies, as fully appears from his Institutes and from his gloss on the Poulterers' case.

Then the learned judge cites the instance of the Wool Merchants' conspiracy, referred to by Coke; and says that this was a *common law offense*, for it is not covered by 27 E. 3, c. 9, prohibiting exportation of wool. Did

the learned Judge examine that statute? He refers to cap. 9; did he fail to see cap. 25 of the same act? That paragraph in express terms refers to "conspiracy, con-"federacy, etc., for the impeachment, disturbance, defeat-"ing or decay of the Staples."

On page 338 the case of *Brereton et al., Noy.* 108 (proper citation Noy, 1st Ed. 103), is cited and the Maryland Court say: "This was a case of fraud effected by "a confederacy, and the injury was to an individual; the "suppression of a will by one was not an indictableoffense. "* * * It was the confederacy alone which rendered "it criminal, and therefore the information was against "the offenders conjointly."

It would be difficult to compress in the same number of words more misstatements concerning this case. It was *not* a case of fraud *effected* by a *confederacy*. All the parties were principals in suppressing the will, and the report so states. Neither the word confederacy, nor its equivalent, nor any synonymous nor cognate notion is expressed or implied in the case. It is no more an authority for a conspiracy case than if four had simultaneously assaulted and killed one, and all had been indicted for murder. True, the "injury was to an individual," just as if A had assaulted B and robbed him, and in no other sense. The suppression of the will by an individual *was* an offense cognizable by that Court, by 3 Hen. 7, c. 1, and by 4 Edw. 3, c. 11. It was *not* the confederacy *alone* which rendered it criminal, no more than in the instance of murder, above cited. The case is just as good an authority for novel disseisin or mort d'ancestor as it is for conspiracy; no better, no worse.

On pp. 339, 340, the so-called bastardy cases are cited,

first of which is *Childe* v. *North* (1663); 1 Keb. 303; s. c. 1 Sid. 68; *King* v. *Armstrong*, 1 Vent. 304; *Queen* v. *Best*, 2 Ld. Rayd. 1167; Holt 151.

These cases were conspiracies or rather "confederacies" falsely to "charge" one with being the father of a bastard child, with intent to extort money, etc. Judge Buchanan insists that the word "charge" was not used in its technical sense, but only meant that the conspirators intended to extort money from the "individual by going to him "and affirming that he was the father, etc., with a view to "inducing him to pay them to say no more about it."

This is a plain misstatement of the cases. The contention by defendants was that the contemplated charge was cognizable only by the spiritual courts and hence the common law had no jurisdiction to punish an agreement to make such a charge. This was answered by Twisden, J., in Childe's case, as reported in 1 Sid. 68, that the charge was cognizable by the Justices of the Peace. The opinion of Holt, C. J., in the Best case, too long to quote here, clearly shows the conspiracy was to make a false accusation, in a spiritual court, of bastardy, though the conspiracy did not reach the stage of actually preferring the accusation; and *"per curiam:* This is a conspiracy to "charge one falsely with fornication, which though it (i. "e., fornication) be no crime at common law, yet is pun- "ishable in the spiritual courts; and a confederacy to "charge with a thing that is a crime by any law is indict- "able." Holt, 151. In the report in 2 Ld. Raym. 1167, the indictment is that they conspired, etc., *"ad onerandum "et accusandum,"* which, of course, are terms of art, and mean to procure an indictment or an information before some judicial body. Moreover, it was stated, on p. 1169

of Ld. Raym. report, that two justices had adjudged the prosecuting witnesses (in the conspiracy case) to be the father, etc., on which Holt, C. J., remarked: "If the "defendants had pleaded that conviction it would have "been a good bar to the indictment" (for the conspiracy).

If the learned Maryland Judge had read Keble a little more closely, he would have found another bastardy case, but one fatal to his contention. In *Green* v. *Turnor*, 3 Keb. 399, the information was for a conspiracy to "draw "sums of money from the plaintiff, not for getting the "bastard." There was a difference of opinion at first among the judges of King's Bench; Twisden, J., insisting that the information did not lie. After conviction, however, judgment was stayed. This case is precisely what Judge Buchanan insists the Childe and Timberly case in 1 Keble to be; but in the latter the same Court held the combination to be indictable, while in the Turnor case defendants were discharged. This shows conclusively that the Childe case was to charge, that is, to cause to be indicted or complained against in some court, the putative father, with the ulterior motive of blackmail; while the Turnor case was just what it says it was, namely a conspiracy to blackmail and not to "charge" with bastardy, and the latter agreement was held not indictable. If further confirmation of this view be needed, it can be found in the remarks of Lord Denman, C. J., in *Rex* v. *Seccard*, 1 A. and E. 706 (1834).

On page 340 the Court cite *King* v. *Bryan*, 2 Stra. 866 (1730), for the *obiter dictum* of the English Court referring to *King* v. *Armstrong*, saying, "there the conspiracy "was the crime; and an indictment will lie for that though "it be to do a lawful act." The Bryan case was not a

conspiracy case at all, and the *dictum* was not only wholly unnecessary, but, as stated, was not the law.

On p. 344 Judge Buchanan cites the Markarty case, and while admitting that the defendants were not charged "with a conspiracy *eo nomine*. it was the combination "alone on which the prosecution would have been sus- "tained." Similar remarks are made on the Wheatley and Orbell cases. *Rex* v. *Markarty et al.*, 2 East, C. L. 823; *Rex* v. *Wheatley*, 2 Burr. 1125; *Rex* v. *Orbell*, 6 Mod. 42. Markarty's case was a cheat, *effected* by a conspiracy, a totally different offense from a conspiracy to cheat. At common law it was indictable for one to cheat another by the use of false weights, measures or tokens; so, too, it was a crime for *several* to cheat one by means of a conspiracy. It was not a crime for *one* to cheat another by false representations; but if two combined in the false representations and *thereby* effected the cheat, that was indictable as a *cheat* accomplished by means of a conspiracy. To illustrate: A sells a horse to X, falsely representing it to be sound and kind. This is no indictable cheat, because there are used no false weights, nor false tokens, nor any *conspiracy*. But A and B agree to falsely represent the horse to be sound and kind, and X, believing the combined statements, buys the horse. Here is an indictable offense—not an indictable conspiracy—but an indictable cheat; indictable because *effected* by a conspiracy. Judge Buchanan has utterly failed to grasp this distinction, though set out in most perspicuous language by Lord Mansfield in the Wheatley case; a case cited by the Maryland Court.

At p. 345 Judge Buchanan cites Edwards' case, *Rex* v. *Edwards*, 2 Stra. 707; 8 Mod. 320, *and states the deci-*

sion just exactly the opposite of what it really is. The case was a conspiracy to procure two paupers to marry, and then settle both on one parish. The Maryland Judge says that this was "held by the Court to be an indictable "offense at common law; for that a bare conspiracy to do "a lawful act to an unlawful end was a crime."

On the demurrer to the indictment in this case Lord Raymond gave judgment for the defendants, *"Because "not an offense indictable."* See the report in 2 Stra. 707.

On p. 345, Cope's case, the conspiracy was to hurt a card-maker's trade by procuring his apprentice to put grease into the paste. Judge Buchanan says it was no crime to put grease in the paste, and that the case is an authority for the proposition that an agreement to do an *unlawful act* is a crime. The answer to this is that it *was* a crime by statute for an apprentice to wilfully injure his master's goods; and so the conspiracy was to commit a *crime. R.* v. *Daniell,* 6 Mod. 99; 5 Eliz., c. 4, sec. 35.

King v. *Eccles,* 1 Leach, C. L. 274, is considered by the Maryland Court (p. 346) to be a strong case in support of the argument of Judge Buchanan. The report is meagre, but it seems that the indictment was for conspiring to impoverish a tailor by "indirect means." Speaking of this case, and of the Cope case, *supra,* Judge Buchanan says they were conspiracies leveled at individuals, in which the public had no concern. In a note to the report of Eccles case attention is called to Lord Ellenborough's statement in *Rex* v. *Turner,* 13 East 228, that the Eccles case was considered a conspiracy in restraint of trade and so one affecting the public. Yet the Maryland Judge passes this over entirely. Certainly it could not have been deemed solely to depend on the object for its criminality.

for that was simply to "impoverish;" and not a conspiracy under the authority of *King* v. *Starling*, unless the "indi- "rect means" were criminal.

On p. 347, *King* v. *Robinson et al.*, 1 Leach C. L., 37. 1744, is cited. This was a case in which the indictment charged a conspiracy for Taylor to personate Holland, the employer of the Robinson woman, and marry her "that she might entitle herself to his (Holland's) estate." They did so intermarry, Taylor being disguised in Holland's clothes and wig and using Holland's name. Of this case the Maryland Judge says: "It has been in- "geniously argued here, but not ventured on by those "who conducted the defense of Robinson and Taylor, "that they meditated a perversion of the course of jus- "tice, as her right to Holland's estate could only have "been established by judicial proceedings. It was not "so charged in the indictment, &c." It does not appear how Judge Buchanan knew what the indictment charged, for the report sets out no more than we have quoted above. In the marginal syllabus in Leach the case is stated to be a conspiracy "for the purpose of raising a "specious title to the estate;" and a reference is made to 2 East., P. C. 1010, where the language is used that the purpose of the conspiracy was that of "afterwards "raising a specious title to the property of the master." The suggestion of the court that counsel for Robinson and Taylor did not make the "ingenious" point as to perversion of justice seems a little singular. Why should they help out counsel for the Crown in making a good case against their clients?

A conspiracy to raise a specious title to an estate was a statutory offense under the express language of 33

Edw. 1, for they "confeder * * * falsely to move "or maintain pleas." This statute is in full force in England to-day, as it has been since its enactment, and its provisions have been extended and enforced by numerous other Acts. 1 Edw. 3, s. 2, c. 14 (1326); 4 Edw. 3, c. 11 (1330); 20 Edw. 3, c. 4 (1346); 1 Ric. 2, c. 4, 1 Ric. 2, c. 7 (1377); 7 Ric. 2, c. 15 (1383); 3 Hen. 7, c. 1 (1487, which is the celebrated Act reviving Star Chamber); 32 Hen. 8, c. 9 (1540). These statutes are directed at conspiracies for the perversion of justice and are in the direction of continual expansion of the Acts of Edw. I.

On p. 347 Rispal's case is cited. 1 W. Bl. 368; 3 Burr. 1320. This is not a conspiracy case at all, but a cheat effected by a conspiracy, as expressly stated by Lord Mansfield in his opinion.

Macklin's case (1 C. & K. 28 n.; 2 Campb. 372 n. The indictment is set out in 6 Wentw. 443. See 6 M. & G. 217 n.), cited by the Maryland court, is not a conspiracy case, the charge having been riot and obstruction of the play, and the words of conspiracy in the first count are only matter of inducement. The Lara case, cited at p. 347 (*King* v. *Lara*, 6 T. R. 565, 1795), is a case against a single individual for a cheat.

The De Berenger case, cited at p. 348 (*King* v. *De Berenger*, 3 Maule & S. 67, 1814), was a conspiracy to raise the price of public funds by false rumors concerning the Napoleonic wars. The Maryland Judge says: "It was clearly on the point of individual injury that the "Court went." Lord Ellenborough, who *decided* the case, said (p. 72): "A public mischief is stated as the "object of this conspiracy. * * * It is a fraud lev-

"eled against all the public." How the Maryland Court can state that the case went off on the point of individual injury, in the face of the express declaration of Lord Ellenborough, is certainly not very clear. Moreover, conspiracies to disturb the market by false rumor was made a crime, centuries before the De Berenger case was decided, by 27 Edw. 3, st. 2, c. 25 (1353); 37 Edw. 3, c. 5 (1363); 6 Edw. 6, c. 15 (1552); 25 Hen. 8, c. 2 (1533); and so the case is no authority on the common law of conspiracy.

Moreover, all of the English statutes from the time of Edw. I. to the fifth year of Geo. II. relating to conspiracies were in full force and effect in North Carolina at the date of the decision of the Younger case, *infra*. See Xavier Martin's Collection of the Statutes, 1792.

As to the case of the Journeyman Tailors of Cambridge (8 Mod. 10), cited on p. 350, we have elsewhere commented thereon and shown that it in no wise supports the argument of the Buchanan case. The remark of the Maryland Court, that the indictment was not under 7 Geo. 1, st. 1, c. 13, is quite true, but for a reason that that learned judge did not in the least suspect, viz., that the statute in question applied only to tailors "with-"in the bills of mortality," *i. e.*, London, and not to Cambridge tailors; but nevertheless there were statutes covering the case of their agreements to raise wages, 2 & 3 Edw. 6, c. 15 (1548); 6 Edw. 6, c. 15 (1552), and 5 Eliz., c. 4 (1562); and as we have explained before, the statute having denounced the "conspiracy" to raise wages, under the decision of 27 Ass. 34, the "confederacy" to do so was a common law crime. This case is generally discredited. Stephen says it is of "doubtful" authority (3 Steph. Hist. Cr. L. 209). Lord Campbell

declined to follow it (*Hilton* v. *Eckersley*, 6 E. & B. 47, 62). In addition to the unreliability of Modern R. the case intrinsically is suspicious, for the reporter seems to make it turn on 7 Geo. 1, which, as we have said above, did not apply to Cambridge.

King v. *Delaval*, 3 Burr. 1434 (1763) is cited on p. 350. This was where a master conspired to assign the indentures of his female apprentice to defendant for purposes of prostitution. The Maryland Court say the end was not unlawful, but the conspiracy alone made the crime. It cannot be doubted that at that time the master could have been indicted for the offense, aside from the conspiracy, under the declaration of Lord Mansfield that King's Bench was *custos morum*. *King* v. *Sidley*, 1 Sid. 168 (1664); *Bagg's Case*, 11 Rep. 93, 100.

On p. 350 the Court cites Hawkins P. C. and professes to quote him as follows: "There can be no doubt that "all *combinations* whatsoever wrongfully to prejudice a "third person are highly criminal at common law." Hawkins does not use the word "combinations" but "confederacies," a word which had a very different meaning from combination in his day. We have examined his statement elsewhere in this argument and shown that as understood by the Maryland Court the doctrine is flatly contradicted by the very authorities cited by Hawkins.

The foregoing are practically all of the authorities relied on by the Court in the Buchanan case. Some of them are misquoted; some are misstated; in some there are suppressions; in some reckless statements are made as to the common law when the cases were founded on statutes; several are not conspiracy cases at all; in one at least (Edwards case) the judgment of the Court is

precisely the opposite of that given by the Maryland Court!

The Court is also capable of misstating a case which makes against its thesis; for example, *Rex* v. *Turner*, 13 East. 228, which was an agreement to go upon another's grounds, with ar[illegible], and there to snare hares. Lord Ellenborough, in holding this not an indictable offense, says that the agreement was "to go and *sport* upon an-"other's ground," meaning of course (as the report says) to snare hares there; to poach; but Judge Buchanan seizes upon the phrase "to sport" and calls it entering another's close "for the purpose of *innocent amusement*," as though the defendants had been boys entering to play leap-frog!

So also is the Court capable of omitting entirely cases which are not decided to its liking; for while citing cases from the Year Books, he omits to cite the case of the forged release, held not to be a ground of conspiracy: Y. B. 39 Ed. 3, 13a.; he omits the agreement to imprison, held not a conspiracy; Y. B. 24 Ed. 3, p. 75: he persists in stating that it was a *common law conspiracy* for merchants by "conspiracy, confederacy, &c.," to disturb the staples and raise the price of wool, and cites in proof thereof the Articles of Inquest of 1354 directing the Assises to inquire into such conspiracies, 27 Ass. 44, item 19, when in truth that "item" follows exactly a new statute of Edw. 3 just passed. 27 Edw. 3, st. 2, c. 25. He misstates Lord Coke's doctrine of conspiracy in the Poulterers' case; and, perhaps worst of all, in his attempt to show that 33 Edw. 1 meant only to define a few of the then existing conspiracies (pp. 334 *et seq.*) he omits the last line, which calls the statute the "ordinance and *final definition* of conspirators."

The very essence of a judicial decision founded on precedent consists in a faithful and true presentation of the authorities relied on; that many of those authorities exist *only in a language unintelligible* to the majority of the bar emphasizes the need of truth. Speaking for the bar and the litigants represented by them, we affirm that our respect for the American bench is bottomed principally on a well founded belief in the moral and intellectual honesty of the incumbents. Take away that confidence and anarchy will impend. We venture the assertion that nine out of ten conspiracy cases in this country since 1825 have cited and followed the Buchanan case. On its authority hundreds of men have lost their liberty. We now appeal to this Court to set its seal of condemnation upon this partisan decision, this false precedent.

It is scarcely worth while to pursue this question of a common law conspiracy further. An examination of the American cases will disclose that they are, one and all, founded upon the English cases already reviewed; or upon Hawkins' statement; or upon some blind copyist of Hawkins, as Archbold, Chitty, Bishop or Wharton; or upon the Buchanan case. If we have succeeded in our endeavor to show the polluted source of this stream, what boots it to analyze the waters lower down?

Take two instances only, Massachusetts and New Jersey; both of them in the very first rank as expositors of the law.

In *Comm.* v. *Judd*, 2 Mass. 329 (1807), Ch. J. Parsons held that a combination to manufacture a spurious article of indigo and to put it on the market as the prime article was a common law criminal conspiracy. The learned judge defines the crime: "A conspiracy to do

"a lawful act for an unlawful purpose is an offense." He cites only three authorities: *Rex* v. *Edwards*, 2 Stra. 707; 8 Mod. 320; *Rex* v. *Robinson*, 1 Leach 47, and the *Journeymen Tailors' Case*, 8 Mod. 10. The first of these was the combination to settle two paupers on a certain parish by causing them to intermarry, which was held by Lord Raymond to be *no indictable offense;* the second was a crime by virtue of the English statutes 2 & 3 Edw. 6, c. 15, and 5 Eliz., c. 4; the third was a maintenance case within 33 Edw. 1. It is thus clearly to be seen that the decision finds absolutely no support in the authorities cited. It is but fair to say, however, that the Court had no assistance whatever from counsel for defendants. They seem to have rested their case on the futile proposition that a conspiracy to defraud the public generally was no offense; apparently conceding that the combination to sell the inferior article to individuals named would have been criminal.

In New Jersey the early statute of conspiracy restricted the crime to combinations to indict an innocent falsely of a felony. A case arose in 1827 in which the indictment charged a conspiracy to defraud a bank by drawing checks when the conspirators had no funds. *State* v. *Rickey*, 4 Halst. 293 (1827). The indictment was quashed by the Supreme Court; by Ford, J., because it was no conspiracy to agree to defraud the bank by the means proposed, holding that there was no conspiracy at common law; and by Drake, J., because the frame of the indictment was defective. The opinion of the first named judge is instructive. He quotes Coke and Blackstone on conspiracy, both restricting it to 33 Edw. 1; then he takes up Archbold's definition, which is a literal transcript of Hawkins, and reviews the for-

mer's authorities, showing how far short they fall of the definition.

But later the same Court takes up the same question. *State* v. *Norton*, 3 Zabs. 33 (1850), and chiefly on the authority of *State* v. *Buchanan and Hawkins*, repudiates the sound reasoning of Judge Ford, and insists on the undefined "common law" conspiracy.

In the opinion of the majority in the case at bar, we find, as above stated, *State* v. *Buchanan* put in the front rank.

Next is cited *State* v. *Burnham*, 15 N. H. 396. This case relies on the following authorities: Hawk. P. C., which we have already referred to and demonstrated that the text, as generally now understood, is wholly unsupported, nay even contradicted, by the precedents cited; Chitty, Russell and Archbold are merely servile copyists of Hawkins; *Comm.* v. *Judd*, 2 Mass. 329, which, as we have shown, relies on one case holding the combination *not* to be a conspiracy, and two others covered by English statutes; *Comm.* v. *Hunt*, 4 Metc. 111, which holds that a combination among workmen not to work for any employer who employed journeymen not members of the boot-makers' club was not a crime. Much is said in this last case by the learned Ch. J. Shaw about what acts are or are not indictable conspiracies; but the only point ruled was as stated, and that the indictment did not charge a crime; the rest was *obiter*. *Lambert* v. *People*, 9 Cowen 578, holds an indictment to cheat and defraud by wrongful and indirect means does not state a crime. The opinion of Senator Stebbins referred to by the New Hampshire Court is a minority opinion. *King* v. *Seward*, 1 Ad. & E. 706, holds a com-

bination to procure two paupers to intermarry to settle both on one parish is *not* an offense. *King* v. *Eccles*, 3 Doug. 337, we have heretofore discussed. *Fowler's Case*, 3 East. P. C. 461 (should be 1 East. P. C. 461), was the same as Seward's (*supra*) and was held *not* indictable. *Best's Case*, 2 Ld. Raym. 1167, was a conspiracy to prosecute one criminally within 33 Edw. 1. *Vertin* v. *Lord Clive*, 4 Burr. 2475, was a combination among nearly all the officers in command of Sepoys to resign in time of public danger. It was held under the *Indian Mutiny Act* that this was a crime. This is a case decided under military, not under common law. *Comm.* v. *Davis*, 9 Mass. 415, seems illy considered. It would appear to be a cheat effected by a conspiracy and not a conspiracy to cheat. The opinion is just one line and a half long. It does not seem ever to have been cited in Massachusetts in subsequent cases. *Gill's Case*, 2 B. & Ald. 204, was a case which held a charge of conspiracy to cheat and defraud by divers pretenses and subtle means was good. This case has been strongly criticised by the English bar and subsequent English cases. (See *Rex* v. *Richardson*, 1 M. & R. 402; *Rex* v. *Fowle*, 4 C. & P. 592; *Rex* v. *Bins*, 1 A. & E. 327; *Rex* v. *Peck*, 9 A. & E. 686.) The matter has been cured in England by making a bill of particulars demandable of right; a virtual overruling of the Gill case. *State* v. *Buchanan*, 5 Har. & J. 317, on which we have commented at length The *Tailors of Cambridge Case*, 8 Mod. 10, which, as we have shown, is founded on an English statute. *King* v. *De Berenger*, 3 M. & S. 67, also under a statute, as shown above.

Thus we see the New Hampshire case is without support in the authorities cited.

The case of *State* v. *Pulle*, 12 Minn. 164, next cited by Judge Clark, is even worse, for to the point of common law conspiracy only the single authority of the Judd case, *supra* is cited.

Judge Clark then refers to *Comm.* v. *Hunt, supra*, which only decided one point, and that against the alleged conspiracy. Then *U. S.* v. *McCord*, 72 Fed. R. 159, is cited. This went off on the sole point that limitations began to run from the instant the minds of the conspirators met.

Then, of course, *State* v. *Younger*, 12 N. Car. 357 (1827), is cited by Judge Clark. This was a combination by several to get one drunk and cheat him at cards. There was a motion to arrest the verdict of guilty. The Attorney General submitted the case in the Supreme Court without argument, and there was no appearance for defendants. Thus was the Court without assistance.

After stating the ancient law of conspiracies, the learned Ch. J. Taylor remarked that modern cases had greatly extended the older doctrine, so that "every con-"spiracy to injure individuals, or to do acts which are "unlawful, or prejudicial to the community, is a con-"spiracy and indictable; as where divers persons confed-"erate together by indirect means to impoverish another: "or falsely and maliciously to charge a man with being "the reputed father of a bastard child; or to maintain "one another in any matter, whether it is true or false. "(Hawk. 466, sec. 2.) Playing at cards for money is "in itself unlawful, and where two persons conspire to-"gether to make an unlawful act the means of doing an "injury to or impoverishing another, it is stronger than "many of the cases which have been held indictable.

"Even a bare conspiracy to do a lawful act to an un-"lawful end has been held indictable, though no act was "done in consequence thereof. (8 Mod. 321.)" The Court then cites the Wheatley case, the Mackarty case and *Comm.* v. *Ward,* 1 Mass. 473.

In the instances given by the learned Judge we discover some old friends. To impoverish another by indirect means is the Eccles case; to falsely charge one with being the father of a bastard is the Timberley and other bastardy cases; both of which we have examined at length, *supra.* To maintain one another, true or false, is directly covered by 33 Edw. 1, then in force by express enactment in North Carolina. 8 Mod. 321 is the Edwards case, held *not* indictable. *Comm.* v. *Ward,* 1 Mass. 473, was a combination to get goods on credit and abscond. There was no motion in arrest; but in a note the reporter naively says he supposed the motion was abandoned, because counsel's attention had been called to the Mackarty and Wheatley cases, both of which are old acquaintances, but neither a conspiracy case. The Ward case is referred to in *Comm.* v. *Eastman,* 1 Cush. 189, 224, as being *dictum* merely; and was there distinctly overruled, if a *dictum* can be said to be overruled. Thus examination shows the ruling in the Younger case to be based on no precedent whatever.

Next the majority opinion cites the Brady case (107 N. Car. 822). The opinion in this case cites the shop-worn English precedents on the frame of the indictment, and for the nature of the offense relies on the Younger case. Follows next the Powell case (121 N. Car. 635). No authority cited save Wharton's forms. Finally the Wilson case (121 N. Car. 650) is appealed to. This

last, so far as the offense of conspiracy is concerned, relies on the Younger case and 2 McClain Cr. Law, § 959.

Thus, so far as North Carolina has decided, conspiracies in that State rest principally on the Younger case; and this laborious analysis of the majority opinion in the case at bar shows, we submit, that the conclusion as to what is a criminal conspiracy and that there was such an offense at common law to be wholly without valid support.

The inconsistency of the North Carolina cases in their rulings as to common law crimes is well illustrated by the decision in *State* v. *Kessler*, 78 N. Car. 469, which holds that incest is not a common law crime; and since there was no such offense by statute, defendant was discharged. Yet the common law offense of incest rests upon precisely the same authority as the common law offense of conspiracy, namely the "Mirror," Seld. Soc. Ed., pp. 28, 29.

(c) *Common-law of conspiracy abolished by Statute in North Carolina.*

If there ever were any such thing as a common law of criminal conspiracy in the State of North Carolina, it has been abolished by statute.

The Statute of North Carolina provides, Rev. Code, § 641: "All such parts of the common law as were "heretofore in force and use within this State, or so "much of the common law as is not destructive of, or "repugnant to, or inconsistent with, the freedom and "independence of this State and the form of government "therein established, and which has not been otherwise "provided for in whole or in part, not abrogated, repealed

"or become obsolete, are hereby declared to be in full "force within this State." This Act has been in force in substance since 1715.

In addition thereto, long prior to the Declaration of Independence a great number of English statutes of a very early date were also in force. These included nearly all of the general acts of the English Parliament, not peculiar to local conditions, from Magna Charta to George II. (see Xavier Martin's collection, 1792) and embraced all of the conspiracy statutes which we have cited above.

Now in 1827 the case of *State* v. *Younger*, 12 N. Car. 357, was decided, by which a very broad definition of criminal conspiracy by the common law of the State was established.

Upon the face of the Statutes and the Younger case we have then: All the English statutory conspiracies; all the English common law conspiracies; and conspiracies covered by this last mentioned case.

This situation continued practically unchanged for forty years (except for the repeal in 1834 of all of the English Statutes above mentioned) until 1868, when an Act was passed making it a criminal offense to conspire to incite insurrection, etc., and denouncing a maximum penalty of ten years.

Our contention is that the passage of this act *ipso facto* repealed all of the so-called common law of conspiracy in North Carolina, whether established by the English cases or as interpreted by the Younger case; and this by force and virtue of the Statute above quoted adopting the common law.

The rule at common law is that "a statute made in

"the affirmance, without any negative expressed or im-"plied, doth not take away the common law." 2 Inst. 200.

It is manifest, however, that the Statute in question abrogates this rule and adopts exactly the reverse principle. Reduced to its lowest terms, touching the point here under discussion, it reads: "So much of the com-"mon-law * * * which has not been otherwise pro-"vided for, in whole or in part, * * * (is) hereby "declared to be in full force within this State."

Coke's illustration of the common-law rule is the case of trespass in parks or ponds under West. 1, c. 20; for which vindictive damages and imprisonment are given by the ordinance; whereas at the common law only actual damages could be had; but as the Statute contained no negative words, the common-law action still remained. 2 Inst. 199, 200. Under the North Carolina act, however, any common-law action of trespass theretofore existing would, on the enactment of a law covering such action, be *ipso facto* repealed, though the new law contained no negative, expressed or implied.

But the North Carolina Statute goes a step further and provides that, if any "part" or topic of the common law is legislated upon, without any saving clause, the whole part or topic is abrogated, leaving only the statutory enactment as the entire law on the subject.

A moment's consideration will disclose that this must be so, for there are only two possible constructions to be put upon this portion of the act in question, viz.: the phrase "in whole or in part." First, it must mean that when the legislature provides for a part of the common-law topic, it means to repeal only that portion covered

by the Act, leaving the remainder of the topic in force; or, second, by such provision it means to abrogate the common law covering the entire topic. For example: If the act were to declare that mayhem shall consist of the cutting off one's hand, and affix a punishment, this might be construed as merely changing the punishment for that particular mayhem, leaving the other varieties to be cared for by the common law; or it might be held as repealing all the common law of mayhem, and substituting therefor only the destruction of a hand.

But to give it the first construction would be to render wholly useless and nugatory the entire phrase, "in whole or in part;" for if these words were left out, the first construction would hold whether all or a portion only of the particular topic were legislated on. That is, to change the illustration, if conspiracy to rebel were the portion legislated on it would be a part of the common law which has "been otherwise provided for," leaving the rest of the body of the common law of conspiracy in full force and effect, and the additional words, "in whole or in part," neither add to nor take away from that construction.

If those words are to be given any effect there, it can only be by the construction contended for, the second one above. Thus if the whole law of conspiracy were attempted to be defined, or if only a part of that topic, in either case all the common law on that subject is repealed, as we contend.

Particularly should this construction be adopted in penal cases for the additional reason that it is in favor of liberty.

United States v. *Wiltberger*, 5 Wheat. 76.

That this was the understanding of the legislature seems clear; for, two years later (Laws 1870-1), they pass an act denouncing a penalty against railroad employees who conspire to cheat the railroad company. Later, in 1879, a law to punish conspiracies to abduct children. And finally, in 1889 (c. 374), an act to define and punish conspiracies against trade (so-called anti-trust act).

From 1834 to the present date the four above-named combinations are the only ones mentioned by the Statutes of North Carolina.

We conceive our argument to be greatly strengthened by the foregoing legislation. The object and purpose of the Act of 1868 was to enact a law of conspiracy respecting uprisings, and thereby in connection with sec. 641, *supra*, to repeal all common-law conspiracies. Experience showed that the law was inadequate and other acts were passed as above set out.

It may be urged that, since 1868, the Supreme Court of North Carolina has passed on the subject of conspiracy, and has again held the English common law on that subject to be in force.

Whatever may be said of the later cases, it must be conceded, we think, that no case prior to 1868 can possibly be an authority on the question of whether or not the Statute of 1868 operated as a *repeal* of the common law of conspiracy. The Younger case would still stand as a precedent as to what *was* the common law of conspiracy; but not at all pertinent to the effect of the Act of 1868.

The first case after 1868, on the nature and definition of conspiracy, was in 1880, *State* v. *Jackson*, 82 N. Car.

565. This was a conspiracy to indict a woman for infanticide. No point was made on the indictment, and the case was reversed for manifest error. The case of *State* v. *Brady*, 107 N. Car. 822, decided in 1890, did not discuss the nature of the crime, but only the frame of the indictment, assuming a combination to cheat and defraud to be a crime. In *State* v. *Turner*, 119 N. Car. 841 (1896), no question is raised on the charge, which was a combination to defraud insurance companies. *State* v. *Powell*, 121 N. Car. 635, and *State* v. *Wilson*, 121 N. Car. 650, both were in 1897 and both combinations to prostitute women. *State* v. *Mallett*, 125 N. Car. 718 (1899), was a conspiracy to cheat and defraud creditors.

The foregoing constitute all the cases on conspiracy since 1868 in which the combination was expresssly or impliedly held a crime. A reading of them leaves a sense of the utter inadequacy of the discussion, on the part of either court or counsel, of the nature of the crime. The strong impression is that counsel left the Court without assistance and that the latter failed to grasp the principles underlying the law. For example, it is gravely said that it is an essential ingredient to the crime that "the common purpose was carried into execution." (Turner case, *supra.*)

The point here insisted on, however, is that no reference whatever is made to the statutory condition of the offense, the statute adopting the common law and the effect of the Act of 1868, in conjunction therewith, in repealing the common law of conspiracy. This legal aspect does not seem to have occurred to counsel in these cases, and is not anywhere mentioned by the Court. It

results that the statute in that aspect has never received judicial construction in the State, and the decisions above recited cannot be binding until they shall have been considered in reference to the statute. It has not infrequently happened that a statute bearing on the case on hearing has been overlooked by court and counsel and the case decided without reference to its terms. In such event it has never been held that the decision was in any sense a construction of the statute.

THERE BEING NO LAW WHATEVER OF NORTH CAROLINA, STATUTORY OR COMMON, COVERING THE ACTS OF APPELLANTS, THE SENTENCE AND JUDGMENT WERE NOT "DUE PROCESS OF LAW," AND HENCE UTTERLY VOID.

This proposition is the correlative of the provision in our Constitution forbidding the States to pass *ex post facto laws*. If a State legislature may not, after the fact, make that a crime which was not theretofore a crime; so, on the other hand, State courts will not be permitted to adjudicate into crimes acts of a defendant on trial which were innocent at the time such defendant was indicted.

This latter proposition, we take it, was true even before the enactment of the XIV Amendment, under the authority of *Loan Association* v. *Topeka*, 20 Wall. 655; *a fortiori* is it true since the adoption of that Amendment.

We have become so used to a recurrence to the letter of our various Constitutions, National and State, that we are apt to overlook the existence everywhere in our country of unwritten constitutions, without which the mere written documents would be waste paper. No country ever succeeded with an alien made-to-order written constitution; no civilized country exists today with-

out some sort of an unwritten fundamental law. The English Constitution is as vigorous, as certain and as free as our own; though wholly unwritten. Connecticut had no written Constitution till 1818; Rhode Island, not until 1842.

We recognize and obey, and our courts enforce, the provisions of our unwritten Constitutions, just as we do the written provisions, because both are the product of the evolution of our race; they are a part of our mental and physical organization. These are the veriest platitudes stated alone, but it is not usual to see the statements brought together in their legal aspect; and yet this is perhaps their most important aspect.

Now, whether it be included in due process of law or not, or in the rights, privileges and immunities of citizens of the United States, or as a right guaranteed as fundamental by our unwritten Constitution, we submit that no State court can be permitted to create a wholly new crime and assess a penitentiary sentence on conviction thereof. Certainly not so long as the case of *Loan Ass'n* v. *Topeka* is an authority in this land. Suppose, for example, some State had revived the practice of Star Chamber, before the adoption of XIV Amendment, whereby defendants could be convicted and grievously punished without a jury, on *depositions* of witnesses without cross-examination and without counsel. Would not a Federal court say: "Our ancestors fought that engine of tyranny for two centuries. It well nigh destroyed our liberties. We abolished it in 1641. A few years later we chopped off a King's head quite largely on account of that very court. It has become an unwritten fundamental right for our citizens to be tried in

a wholly different way; and we will not permit a revival of the old." Such, at least, seems to us would have been a perfectly sound argument prior to 1868.

If a State should attempt to establish *lettres de cachet* as they existed under Louis XIV would not this court now say that they are not due process of law? And if so, where would we get our definition of "due process" except from our unwritten Constitution? Thus we push the matter back one step and that is all; we still reach the elder, the unwrittten law. We have discussed a slightly different aspect of this matter under subdivision 7 below, citing many decisions of this Court recognizing the principle now contended for. To these authorities we respectfully refer the Court, to be noted in this connection.

It may not be inappropriate to digress for a moment to call the attention of the Court to the fact that a vast deal of fustian has been written on the esoteric nature of this crime, its mystery, its secrecy and its dangerous character. It may well be granted that when the combination embraces a great number of people, as in widespread treasonable conspiracies or agrarian outrages, the statements are true; but when two or three combine merely to effect some private wrong, as in this case, such language is hyperbolical to the highest degree. If several, for example, get together in a room and agree to cheat some one or to commit any ordinary crime, the combination has absolutely harmed no one save the conspirators, and society is no whit injured. It is simply to misuse language to say otherwise. If now these conspirators begin to act, as a rule, little or no harm is done to society or the individual, until the object of the con-

spiracy is accomplished. When that is done, in all but an infinitesimally small portion of the cases, some substantive statutory crime has been committed, in which all are principals, or some principals and some accessories; and for which all may be punished at least as heavily and generally more harshly than for the conspiracy. The writer conceives there is little use for the law of conspiracy nowadays, except in the rare cases where the combination is discovered before executed. The legislatures of many States have recognized this reasoning, and have narrowed this field more and more. Some courts and many prosecutors, however, still insist on the "mystery" and the "danger;" but this, it is submitted, means only that it is easier to prosecute a conspiracy case, and more difficult to defend one, than any other kind in the books. In no class of cases have so many innocent persons been convicted. As said by Judge Campbell in *People* v. *Barkelow*, 37 Mich. 455, 457: "The course of legal experi-"ence has shown this to have been a familiar resort to "catch innocent persons, by throwing a drag-net of "vague charges and resorting to suspicions and preju-"dices to induce juries to convict persons who find it im-"possible to escape the malicious insinuations of false "accusers."

This digression has been ventured to show that the crime itself has been enormously exaggerated, probably because we connect the word conspiracy with great seditious and agrarian movements; and so the common offense shines almost wholly by reflected light. It will, therefore, be of no moment to the State of North Carolina if the crime be abolished by this Court. If her people wish a comprehensive law on the subject, it will be a simple matter to enact one.

2. *There was no statute of North Carolina authorizing this heavy punishment.*

The majority of the Court relies upon *State* v. *Mallett*, 125 N. Car. 718, but does not mention *State* v. *Jackson*, 82 N. Car. 565, which holds directly the contrary. The statute construed in the Mallett case is as follows: "Sec. 1097. Offenses made misdemeanors by statute, "where a specific punishment is not prescribed, shall be "punished as misdemeanors at common law, but if the "offense be infamous or done in secrecy or malice or "with deceit and intent to defraud, the offender shall be "punished by imprisonment in the county jail or peni- "tentiary not less than four months nor more than ten "years, and be fined." An examination of this section shows it to have been made up by consolidation of Bat. Rev., ch. 32, sec. 29 and sec. 108. The Jackson case was decided before this consolidation. The sections are as follows: "Sec. 29. Every crime or offense whatever "heretofore punishable by the laws of North Carolina "when the present constitution went into effect with pub- "lic whipping or other corporeal punishment, shall here- "after, in lieu of such corporeal punishment, be punished "by imprisonment in the State's prison (or county jail) "for not less than four months nor more than ten years."

"Sec. 108. Offenses made misdemeanors by statute, "where a specific punishment is not prescribed, shall be "punished as misdemeanors at common law, but the pun- "ishment prescribed in Sec. 29 of this Chapter shall be "used only for crimes that are infamous, or done in "secrecy and malice, or done with deceit and intent to "defraud." It is perfectly manifest from an inspection of these three sections that the first is made up by con-

solidating the last two; and that the latter part of the first section applies only to "offenses made misdemeanors "by statute." This latter proposition is established by the historical aspect, as just shown, for certainly section 108 has reference only to the statutory crimes, and, in the consolidation, its meaning is not extended.

The proposition is also clear and certain from the grammatical construction of the section. The Jackson case, *supra*, so held.

The Mallett case changes that ruling, without citing the Jackson case, on the theory that a conspiracy to defraud is "one 'done with deceit and intent to defraud.' "It is the very essence and substance of it." No attempt is made to explain away the opening phrase of the statute: "Offenses made misdemeanors by statute:" but it is baldly assumed that the latter half of the section refers not only to statutory misdemeanors, but also to all non-statutory common law offenses of that grade; an assumption not tenable under any of the known rules for statutory interpretation. But even conceding for the moment that common law misdemeanors are included within the punishment portion of the section, yet is the interpretation of the Court in the Mallett case and this case wholly indefensible on sound principles. "Deceit" and "defraud" must be used in their technical and not in any loose colloquial sense, since the statute is criminal and one prescribing an exceedingly harsh punishment. This is elementary. Now deceit and fraud at common law in their criminal aspect embrace only the use of false weights, tokens or measures, or a cheat effected by a conspiracy. *King* v. *Wheatley*, 2 Burr. 1125. In the exhaustive examination of the law by the twelve judges

of England in the case of *Reg* v. *Bryan*, 1 Dears. & B. 265, a Crown case reserved, the bench consisted of Lords Campbell, C. J., Cockburn, C. J., Pollock, C. B., Coleridge, Cresswell, Erle, Crompton, Crowder, Willes J. J., and Bramwell, Watson and Channell, barons, probably as learned a bench as ever sat in England. Each judge delivered an opinion, ten concurring, Bramwell, *dub.*, and Willes, *diss.* This was under a very broad statute, 7 & 8 Geo. 4, c. 29, § 53, which provides that if any person shall "by any false pretense" obtain the money, &c., of another with intent to cheat he shall be guilty, &c. The substance of this decision is that there are many false pretenses which do not constitute a cheat within even the all-embracing language of the statute of Geo. IV.

In North Carolina the Court has always held that a cheat must be by false token, weighs or measures, in order to be criminal. In *State* v. *Justice*, 13 N. Car. 199, though the fraud was "flagrantly marked with moral "turpitude," yet because there was no false or public token, nor any practices which would deceive the public at large, it was held no crime. "Civil injuries," say the Court, "should not be the subjects of criminal prosecu- "tions. Good policy does not require the multiplication "of public offenses." See also *State* v. *Politto*, 11 N. Car. 348; *State* v. *Alfred*, 84 N. Car. 349; *State* v. *Phifer*, 65 N. Car. 321; *State* v. *Burke*, 108 N. Car. 750.

An exhaustive case by the Supreme Court of the District of Columbia is that of *U. S.* v. *Watkins*, 3 Cranch C. C. 441.

Again, the Statute uses the word "done;" done with deceit. This implies a finished crime accomplished by

the deceit of some person. But the crime here under consideration was "done" before ever Garrett was seen by any of the defendants. It was "done" when the minds of the alleged conspirators met, prior to the time that any representations were made to the prosecuting witness, and before ever he was aware of the existence of the actors. This is as old as 27 Ass. 34, 44. How then can it be said that this offense was "done with "deceit and intent to defraud?"

Finally, this ruling must be wrong, because by the more than doubtful construction of a doubtful statute the settled criminal law of North Carolina has been changed, and changed into a much harsher channel. It is against all precedent and against reason to suppose the legislature meant to make this radical change by *implication*. That body had named and defined two classes of criminal conspiracies and prescribed a maximum punishment of ten years. Rev. Code, § 974; R. C., § 1107. Why enact these laws if they were already covered by §1097 and the same punishment therein provided? It is said that Nero wrote his edicts in small type and hung them up almost out of sight. 1 Colquhoun Roman Law 316 n. 5. It is submitted that that was no worse than this act of judicial interpretation, overruling the Jackson case, without mentioning it, and establishing this greater punishment, theretofore unknown in the State.

It is a rather curious fact that in the reference to § 1097 in the opinion in the Mallett case, the writer does not *quote* that section, but its legal effect only is attempted to be stated, and that in a manner which the text of the law is far from justifying. It is stated as if the section were divided into two parts; the first re-

ferring to statutory misdemeanors, and the last, as if *in terms* it embraced *all* misdemeanors, statutory or at common law. See p. 723 of opinion.

It has been frequently held by this Court that it will not interfere with the construction of a State statute by the State courts; but is this a hard and fast rule, subject to no exception? Suppose such a construction denies a citizen of the United States some "fundamental" right which belongs to him as a member of a free government, must the rule still apply? We have endeavored in subsection 7, *infra*, to elaborate this question; and to that we respectfully refer the Court for the extended argument, pausing here to make a single suggestion. Suppose a statute of a State defined murder as a felonious killing, with malice, &c., prescribing the death penalty; and the State courts should uphold, under that statute, a capital sentence under a simple assault charge. Would the rule of non-interference by the Federal courts still hold? If this be an exception to the rule, then somewhere between the instance of a manifestly proper interpretation of a State statute by State courts and the extreme case put, must lie the dividing line. It is suggested that the following should be the test: If the construction put upon the statute by the State court be so manifestly wrong that the Federal court, on undisputed canons of construction, can unhesitatingly say the State court is in error; and further, if such error be to the prejudice of some fundamental or constitutional right of a citizen of the United States, then it would be the duty of the Federal court to set aside the judgment of the State tribunal based on such erroneous construction.

Such is this case.

3. *The sentence was not due process of law, because*

greater than can be inflicted for the offense in any other American judicatory.

Montesquieu says: "It is an essential point that there "should be a certain proportion in punishments, because "it is essential that a great crime should be avoided "rather than a lesser." I. Sp. Laws, Bk. VI., ch. 16. Grotius discourses at length on the proportion that should exist between crimes and their respective punishments: and places in the lowest scale, as deserving the least punishment, "those criminal designs, which have proceeded "some degrees, but not to the last stage of completion." De Jure, ch. xx., par. xxx. In an altogether admirable essay on Prison Ethics, Mr. Herbert Spencer points out the evils of excessive punishments for crimes, admitting that in the less advanced stages of civilization a harsh code is needful. But as men progress in manners, severe punishments, instead of being deterrent, actually defeat the preventive object of society by exciting in the mind of the criminal a sense of injustice and animosity, causing him to dwell on the injury done to him by society rather than on his own misdeeds. Thus he nurtures a spirit of revenge rather than a desire for atonement, and on his enlargement reënters society a worse and more dangerous man than when he left it. Essays, Moral, &c. D. Appleton, 1884, pp. 218 *et seq.*, 239 *et seq.* The illogicality of such sentences was demonstrated in England in the 18th Century. When a slight crime was punishable with death, the offender was not at all likely to stop at a greater. As well be hung for a sheep as a lamb; and so, instead of exercising a deterrent influence on minor criminals, the bloody code directly encouraged grave offenses. Leckey in 6 England in XVIII. Cent. 245 *et seq.*, draws a graphic picture of crime and its

punishment during that time. Among other evils of harsh punishments he points out the constant perjury of juries in their unwillingness to condemn to death for trivial offenses.

But the best commentary on this sentence is the 8th Amendment to our Constitution, by which cruel and unusual punishments are prohibited. No point is made in this connection that this amendment applies in a legal sense to the case at bar. The broad statement is hazarded that the provision quoted expresses the genius of the American people; that it declares a fundamental principle among us that an excessive punishment is abhorrent to our system of judicature; and that crimes and punishments should bear some relation of proportion to each other. In short, that as a people we are opposed to arbitrary and excessive punishments. The framers of our Constitution were either fresh from England, or they knew by observation or mediately from their parents, the details of the "bloody code." The Eighth Amendment was the revolt from these extreme punishments.

The truth of the foregoing is made manifest by the legislation of the various States of our Union on the subject of the punishment of conspiracies:

Arizona, one year and $1,000; P. C. § 170.

California, one year and $1,000; P. C. § 182.

Connecticut, to burn public buildings or State military stores, five years; to commit high crimes, five years; other conspiracies, one year, $300; G. S. (1888), §§ 1422, 1642.

Minnesota, three months and $100; G. S. (1894), § 6424.

Alabama, conspiracy to commit felony, six months and $1,000; to commit misdemeanors, three months and $500; Crim. Code (1896), §§ 4428-9, 5414.

Arkansas, conspiracies to overthrow State or intimidate courts, evidenced by some overt act of violence, one to fifteen years; other conspiracies, three months and $100; Ark. Dig. (1894), §§ 1505, 600, 601.

Florida, defined conspiracies, one year and $1,000; common law conspiracies, one year and $500; R. S. Fla. (1892), §§ 2593, 2370.

Georgia, conspiracy to cheat State or county, two to ten years; to indict an innocent falsely, who is accordingly indicted and acquitted, one to five years; misdemeanors, punishment not specified, six months and $1,000; 3 Code (1895), §§ 287, 118, 1039.

Idaho, conspiracies, one year and $1,000; Penal Code (1901), § 4686.

Indiana, "white cap" conspiracies, two to ten years and $2,000; to commit felony, fourteen years and $5,000; conspiracies to falsely indict, six months and $1,000; 1 R. S. (1901), §§ 2065, 2260, 2261.

Indian Territory, conspiracies to overthrow government or intimidate court, evidenced by forcible acts, one to fifteen years; other conspiracies, three months and $100; Stat. 1899, §§ 1164, 1165, 1167, 465r.

Kansas, to obstruct railroads, ninety days and $200; others, one year and $500; G. S. (1901), §§ 2376, 2106.

Kentucky, false prosecutions, twelve months and $100; Stat. 1899, § 1341.

Louisiana, to murder, rob, rape, commit burglary, arson, perjury and forgery, two years and $1,000; to

assault and drive from homes, one year and $1,000; Rev. Laws 1896, p. 215.

Maine, to indict falsely, five years, $1,000; to injure an individual or act injurious to public health, &c., three years and $1,000; R. S. Me. (1883), p. 916, §§ 17, 18.

Michigan, no statutory conspiracy, common law crimes, two years and $2,000; but see *in re* Lamphere. 61 Mich. 105.

Missouri, defined similar to New York, twelve months and $200; R. S. Mo. (1899), §§ 2153-4.

Montana, defined similar to New York, one year and $1,000; Code (1895), § 320.

Nebraska, conspiracy to indict, one year and $1,000; Comp. St. (1901), § 1675.

New York, defined at length; treasonable conspiracy against State, ten years; others, one year and $500.

Ohio, "white cap" conspiracy, two to ten years and $2,000; no common law crimes; 2 Bates. St. (1900). § 6895.

Oklahoma, defined similar to New York, one year and $500; Okl. St. (1893), § 2061.

North Dakota, defined as in New York, one year and $500; Penal Code (1899), §§ 7037, 6812.

New Jersey, defined similar to New York, two years and $500; 1 G. S., N. J. (1895), p. 1093, § 236.

Rhode Island, one year and $1,000; G. L., R. I. (1896), p. 1013.

South Carolina, conspiracy to prevent citizens from voting, &c.; Cr. Code (1902), § 233. No other statutory conspiracy. Common law offenses punishable by

jail sentence and fine in accordance with common usage and practice in the State.

Tennessee, defined as in New York, also common law conspiracies are misdemeanors, but no punishment seems to be prescribed. Conspiracy to indict one falsely of a felony, two to ten years; Code Tenn. (1896), §§ 6693. 6694.

Texas, defined to be an agreement to commit felony: conspiracy to murder, two to ten years; conspiracy to commit other felonies, two to five years; Penal Code (1895), §§ 957, 958.

Wisconsin, no statutory definition, one year and $500; 2 Saub. & B. Ann. St., § 4568.

Virginia, to incite negroes to violence, five to ten years; other conspiracies, jail and fine in discretion of court.

West Virginia, "vigilance committee," one year and $500; others, fine and jail in discretion of court.

Washington, not defined, one year and $500; Code (1896), §§ 5906, 6488.

Illinois, conspiracy to indict, one year and $1,000; to "boycott," to commit felony, &c., common law conspiracies, five years and $2,000; R. S. Ill., ch. 38, §§ 45, 46.

4. *The sentence was not due process because so severe that it raises the presumption that vindictiveness, passion and sectional hatred entered into the judgment of the trial court.*

Three men agree together, let us assume, to obtain the money of a certain liquor dealer named Garrett by means of false pretenses. One of the trio approaches this worthy man, and, pursuant to the agreement, makes certain false

representations to him. Garrett at once fathoms the scheme and calls the attention of his clerk to the departing schemer, saying: There goes "a genuine gold-brick "man" (312 Trans., 69). The plot became abortive from that moment; it never had the slightest chance of success. Thereafter, Garrett, instead of at once denouncing Howard to the authorities, tolled him on, encouraged him, prevented his backing out at the last moment (312 Trans., 73, 75-80, 85); all for the purpose of setting up a false and fraudulent claim to some $2,000 worth of property of defendants (312 Trans., 86, 87). So far as the crime of these appellants is concerned, it seems to be the very mildest conspiracy possible. It deceived no one; it never had the least chance of success; it began and ended in the mere agreement of the plotters; it died at birth. For this abortive attempt, two receive the tremendous sentence of ten years, the third seven.

Look now upon this picture! A man and a woman (presumably husband and wife) agree together to destroy the virtue of a seventeen-year-old girl. The devilish arts used are not disclosed, but the plot succeeds, and a young life is ruined. Only a credulous child's virtue is gone, only a girl's life wrecked. Surely this is but a venial sin; Garrett's dollars are safe, and so the offense being trivial, a trivial punishment will suffice. Two years for the man, nothing for the woman! This is the measure of justice which satisfied the Courts of North Carolina in the Powell case, *supra*. With right-thinking men an attack upon the virtue of a woman necessarily arouses righteous indignation which often hurries them to excess; and therefore had these sentences been transposed; had the destroyer of virtue been sentenced to ten years and the plotters for lucre and gain received two, most people

would say that justice had not gone astray; but, regarding the actual fact, it would seem clear that the passion was not aroused at the sight of a ruined child, but at the contemplation of men from Chicago going down to North Carolina with intent to defraud one of the citizens of that State of his money. Looking at the *sentences* in the respective instances alone, this is a fair conclusion. But there are other elements in this case pointing in the same direction. In spite of a positive law of the State commanding the trial judge to charge on the presumption of innocence, and to charge that such presumption is to be regarded as affirmative evidence of innocence in favor of the accused until overcome by proof of guilt beyond a reasonable doubt, in spite of the fact that such an instruction was specifically asked at the trial (312 Trans., 113, instr. XIV.), the Judge neglected and refused to so charge; and when the case was in the Supreme Court, the point was made and earnestly pressed (312 Trans., 133, Assgt. Error 14, 15). Yet the majority opinion included the error in the category of those exceptions that were "without merit" (312 Trans., 20).

Again, it has been decided in North Carolina that a defendant is entitled to a bill of particulars in a criminal case when the indictment is not specific. *State* v. *Brady*, 107 N. Car. 822, 827. In the case at bar such a bill was prayed and denied, exception taken and the point urged in the Supreme Court (312 Trans., 61, 62; Excep. 1, Tr., 122; Assgt. Error, 1). Defendants then went to trial on the three counts of the indictment, not knowing whether the State would attempt to prove a conspiracy to rob or one to defraud. (See indictment 312, Trans., 60, 61). At the close of the evidence for the prosecution, the State *"nolled"* the second and third counts and

elected to ask a conviction on the first, "the other counts "to be referred to as furnishing particulars" (312 Trans., 106). This charged merely a conspiracy by false pretenses to defraud one Paul Garrett, nothing more. The counts referred to as furnishing particulars charged, respectively, a conspiracy to assault and rob and a conspiracy to cheat and defraud by the false pretenses that the plotters owned certain gold bars, and *nothing more!* (312 Trans., 60, 61). Judge Clark, in the Supreme Court, said: "The particulars were fully furnished by the sec- "ond and third counts, * * * so that they (defend- "ants) were in full possession of all the information a "bill of particulars could have furnished them" (313 Trans., 15). Judge Douglas vigorously protests against this view (313 Trans., 22). Just how a count on a conspiracy to rob or one alleging the ownership of gold bars, could give any information as to the nature of the offense to defendants, the writer confesses his inability to fathom.

Yet again, in flat violation of the law of the State, the trial judge singled out the prosecuting witness, Garrett, while the panel was in the court room on the motion for the rule on the witnesses, and again in his charge, for commendation (312 Trans., 64, 119). Judge Clark evades the first exception by saying the statute applies only to the instructions to the jury; and is silent as to the special commendation of Garrett by the trial judge in his charge (312 Trans., 19). This latter objection was probably also "without merit;" though Judge Douglas had a strong opinion to the contrary (313 Trans., 23-27).

And again, after the arrest and hence after the conspiracy had fully ceased, all sorts of declarations and acts of the various defendants, in the absence of one or more

of them, were introduced (over objection) as evidence against the absent ones. For example, the card with Hawley's name (312 Tr., 93, 99, 100); the trunk check taken from Daley (Tr. 94); the contents of the trunk and of the case (Tr. 94, 95, 104); statements of Hawley, when arrested, and his attempt to destroy a certain letter (Tr. 100). This was in violation of the plainest rules of evidence, even in North Carolina. 3 Greenl. Ev., sec. 94; *State* v. *Dean*, 35 N. Car. 63; *State* v. *Collins*, 121 N. Car. 667.

We are well aware that some of these matters are not Federal questions, but they are recited to show that, law or no law, it was intended by the majority of the Court that this sentence should stand; and the manifest errors in the majority opinion, taken in connection with the heavy sentence, do show a passion, a prejudice against these defendants; and do further show that they were not convicted and punished by the "law of the land," as stated in the dissenting opinion of Judge Douglas.

After a long generation sectional differences are happily fading out in our country. Not the least benefit of the Spanish war is that it greatly hastened the era of restored mutual trust and confidence between the North and the South. In an entirely proper spirit, however, State pride is strong; and it is necessary, in our dual system, that it should continue to be so. Out of this feeling has grown of late years a system of reciprocity between States. This is particularly noticeable in legislation in several of the States respecting corporations, especially insurance companies, by which certain foreign corporations are accorded privileges, provided the corporations of the legislating state receive the same or like privileges

in the domicil of the foreign company. For an example, see Ills. Stat. Hurd's Rev., ch. 73, sec. 227.

Inseparably bound up in the notion of reciprocity is that of retaliation. Let any one State, through its courts and juries, systematically discriminate against the citizens of other States; even though those citizens be criminals, and retaliation will surely follow. This is a consummation most earnestly to be avoided. We submit this consideration should have weight with the Court.

5. *The sentence is not due process because our people are opposed to judge-made crimes, and tolerate them only when followed by mildest punishments.*

To a freeman nothing is more abhorrent than a system of laws which leave punishable acts undefined; and he is right, for nothing is more subversive of liberty. This was the main complaint against Star Chamber—this undefined, illimitable jurisdiction, which was not only unrestricted as to the nature and amount of punishment, but was bound by no pre-ascertained definition of offenses. An evidence of the feeling is the condemnation of Nero, grown into a proverb, for hanging his laws so high that they could not be read. That such is the general sentiment of the American people is shown by their legislation on this topic in the various States, elsewhere set out.

Fitz James Stephens in his History of Criminal Law (Vol. 3, p. 360, *et seq.*) very justly remarks that in a rude state of society, when legislation is scanty, it is inevitable that to the judges should be committed the power to declare new offenses; but in modern times practically all possible crimes have been defined, and should new circumstances arise, the legislature can promptly meet the emergency with a statute. To this may be added the

reflection that as a people advances in civilization and liberty, they become less and less tolerant of confiding to a single judge or even a bench any vague and undefined powers which may affect the security of the individual from arrest and punishment. In 1854 Mr. Justice Crompton, in his observations on the scheme for codification of the criminal law, advocated the retention by the judges of the power to declare new offenses. 3 Steph. Cr. L., 359. Certainly the learned justice was scarcely the person to ask such a power. In *Hilton* v. *Eckersley*, 6 E. and B. 47, some cotton spinners entered into a bond to work only as the majority should decide. Crompton, J., thought the agreement was an indictable conspiracy. Lord Campbell, C. J., could not bring himself to believe that such an agreement to raise wages, unaccompanied with any design to use violence, was an offense. This was in 1856. Had the workmen been tried before Crompton, they would have gone to jail; Lord Campbell would have discharged them. In United States Courts, in New Hampshire, Massachusetts, New York, Michigan, Maine, Vermont, Iowa, Kentucky and Pennsylvania it is not a crime to combine to defraud by false pretenses, unless the pretenses consist of false weights, measures or tokens or some other means *criminal* in themselves.

State v. *Parker*, 43 N. H. 83; *Comm.* v. *Eastman*, 1 Cush. 189; *Comm.* v. *Wallace*, 16 Gray 221; *Lambert* v. *People*, 9 Cow. 578; *Alderman* v. *People*, 4 Mich. 414; *People* v. *Barkelow*, 37 Mich. 455; *State* v. *Mayberry*, 48 Me. 219; *State* v. *Stephens*, 30 Iowa 391; *Hartman* v. *Comm.* 5 Barr. 60; *Comm.* v. *Ward*, 92 Ky. 158; *State* v. *Keach*, 40 Vt. 113; *U. S.* v. *Walsh*, 5 Dill. 58.

On the other hand the States of Illinois, Maryland, New Jersey and others hold that combination to cheat

and defraud by whatever means is criminal. *Cole* v. *People*, 84 Ill. 216 (with a vigorous protest from Scholfield and Dickey, J. J., the former one of the ablest of the Illinois judges); *State* v. *Buchanan*, 5 Har. and J., 317; *State* v. *Cole*, 10 Vroom 324.

"Under which King, Bezonian!" All these courts profess to declare the same common law, though they differ radically as to what that law is; and yet the layman must know *in advance* what a particular court will decide, at his peril of a jail, or in North Carolina, a penitentiary sentence! When the punishment for the judge-made crime is slight, such as a small fine or a short jail sentence, we may be content to permit the practice to continue, but when in such cases a ten-year penitentiary sentence may be awarded—this must give us pause.

In several of the States conspiracy is defined and the statutes expressly declare that no other combinations shall be deemed criminal. In none of the acts, be it observed, is the judge-made conspiracy to do an *unlawful* act, or a lawful act by *unlawful* means, included.

Conspiracies defined, and no combinations other than such are punishable.

Arizona, Penal Code, § 3.

California, Penal Code (1899), § 182.

Minnesota, Genl. Stat. (1894), § 6424.

Montana, Code (1895), Penal Code, § 322.

New York, Penal Code (1900), § 170.

North Dakota, Penal Code (1899), § 7039.

No crimes except statutory. Common law crimes not punishable.

Arizona, Penal Code, § 3.

California, Penal Code (1899), § 6.

Georgia, there appears to be no common law crimes.

Indiana, 1 R. S. Ind. (1901), § 237.

Montana, Code (1895), § 6.

Nebraska, apparently none but statutory offenses.

Ohio, no common law offenses, *Mitchell* v. *State*, 42 Ohio St. 383.

Oklahoma, Stat. Okl. (1893), § 1838.

North Dakota, Penal Code (1899), § 6801.

Texas, Penal Code (1895), § 3.

The objections to judicial legislation are many and serious. The principal ones are admirably summed up by Austin in his Jurisprudence, Lect. 39, part 1: First, the difficulty in deducing, from the vast mass of adjudicated cases, the true *ratio decidendi*, and as a corollary, the necessary ignorance of the entire laity of the rule of law which they are conclusively presumed to know; *second*, many of these rules, from the nature of the case, are laid down in haste, for often the *nisi prius* judge must announce them; *third*, a new rule is always *ex post facto* or retroactive as to acts done prior to the time of its first enunciation; *fourth*, there is no test of the validity of a rule announced from the bench. It may be and frequently is overruled or modified by subsequent judicial decision. An act may be innocent to-day, criminal to-morrow; or criminal to-day and innocent to-morrow. It must be conceded that if all our criminal law thus rested in the bosom of the judge, the situation would be intolerable. That any portion of it so rests is a difference in

degree only, and is subversive of liberty and un-American to the extent that it rests in judicial discretion.

In his Civil Government, Locke says: "For all the "power the government has being only for the good of "society, as it ought not to be arbitrary and at pleasure, "so it ought to be exercised by established and promul- "gated laws, that both the people may know their duty, "and be safe and secure within the limits of the law, "and the rulers, too, kept within their due bounds." Locke, Bk. II., ch. 10, § 137.

The earliest reference we have found to the principle that all laws ought to be promulgated and known before one should be punished for their infraction is in Domat (Vol. 1, § 16). He cites as his authorities *9 Cod. de legibus; 12 Cod. de jur. et fact; § 1 in fin. in prooem. Inst.; 2 Cod. de in jus voc.* Doubtless the references do not support the text, for the extraordinary jurisdiction of the judge in Imperial Rome was not consistent with the proposition. However, the statement is valuable in this that it expresses the sentiment of the ablest continental lawyer of the 17th century, and Domat's text, without doubt, has had no little influence in bringing about the condition which now obtains in all European states whereby there are no crimes except those defined by statute.

In the Penal Code Napoleon of 1810, Art. 4, it is provided: "No contravention, no delict, no crime can be "punished (punis de peines) which has not been promul- "gated (prononcé) by law before its commission."

All the newer codes of Europe, as above stated, recognize the doctrine that there can be no punishment inflicted

except for a crime previously defined by legislation. (See Dr. Hammond's note J to Lieber's Hermenentics.)

The danger of manufacturing new crimes which are within the "reason," but not the language of the statute is well pointed out by Mr. Ch. J. Marshall, in Wiltberger's case, 5 Wheat. 76, 96. A strong expression to the same effect is found in the opinion by Mr. Justice Washington in *U. S.* v. *Sheldon,* 2 Wheat. 119, 121. See also opinion by Taney, Ch. J., in *U. S.* v. *Morris.* 14 Pet. 464. 475; and No. 62 of the Federalist.

In some of the colonies the principle that no act was criminal save those enumerated by the statute or expressly provided for in the Word of God was early adopted. Massachusetts. See Body of Liberties, p. 1, Hutchinson, State Papers, 205. The common law of England is not mentioned. In Connecticut the Code of 1642 is copied from that of Massachusetts. Conn. Records, I., 77. In New Haven Divine law was the original guide in civil and criminal matters, not the common law. 1 New Haven Records, 1. In Rhode Island a Code was adopted in 1647, set out in full in 1 Arnold, Hist. R. I., 205. Crimes were defined, and it was provided that "in all other "matters not forbidden by the Code all men may walk as "their conscience persuades them."

The modern sentiment is well shown in the following extract from the opinion in the Matter of Lamphere, 61 Mich. 105; 108. Campbell, C. J. (one of the ablest of western judges) remarks: "And while we have kept in "our statute books a general statute resorting to the com- "mon law for all non-enumerated crimes, there has always "been a purpose in our legislation to have the whole "ground of criminal law defined, so far as possible, by

"statute. * * * The punishment of all undefined "offenses is fixed within named limits, and beyond the "unregulated discretion of the court." And again on p. 109: "Whatever elasticity there may be in civil matters, "it is a safe and necessary rule that criminal law should "not be tampered with except by legislation."

There is no doubt that this last statement expresses the sentiment of the American people, for it commends itself particularly to their sense of justice and their desire for security.

6. *The trial was not due process because the judge below refused to charge on the presumption of innocence.*

In *State* v. *Heaton*, 77 N. Car. 505, 508, it is said: "As men do not generally violate the criminal code, the "law presumes every man innocent, and this presumption "of innocence is to be observed by the jury in every case."

This instruction was asked and refused by the Court, no reason being assigned; and, worse still, the charge implies that no such presumption exists.

Independent of an express decision, this Court has drawn a sharp distinction between "presumption of inno- "cence" and "reasonable doubt;" and holds that both are necessary elements in a criminal case for the proper legal protection of the accused. The former is considered to be affirmative evidence in the defendant's favor; the latter a burden cast upon the prosecution. Each is, in a manner, the correlative of the other. Estimated quantitatively, if the presumption be neglected, a very small amount of proof might overcome, in the minds of the jury, the reasonable doubt of guilt; but put the presumption in the scales, in turn the slight proof is overcome, and more evidence of guilt becomes necessary on the

part of the prosecution. It is plain, therefore, that the presumption is a vital matter for the accused in every criminal case. That such a presumption exists in our criminal law is, as this Court say: "Axiomatic and ele-"mentary, and its enforcement lies at the foundation of "the administration of our criminal law." Again, the principle is called "vital and fundamental" and a warning is thrown out that it "be not denied, when requested, "to any one accused of crime."

Coffin v. *U. S.*, 156 U. S. 432.

The writer is well aware of the polemical and somewhat acrimonious criticism by the late Professor Thayer of the distinction taken in this case; but a careful perusal of his essay serves only to make the distinction more apparent and the application of the rule the more necessary, so long as we adhere to the doctrine that the presumption exists and is a legal right of an accused. See Thayer Prelim. Tr. Ev. Appendix B.

The Coffin case was explicitly affirmed on this point by this Court in *Cochrane* v. *U. S.*, 157 U. S. 286, 292; and *Kirby* v. *U. S.*, 174 U. S. 47, 55; and is referred to with approval in *Allen* v. *U. S.*, 164 U. S. 492; *Agnew* v. *U. S.*, 165 U. S. 36.

If, as said in the opinion in the Coffin case, the presumption of innocence is "vital and fundamental," it comes within the express language of the cases of *Brown* v. *New Jersey*, 175 U. S. 172; *in re* Kemmler, 136 U. S. 436; and *Hurtado* v. *State*, 110 U. S. 516, more fully cited in subdivision 7 *infra*. A denial of such a right by any instrumentality of a State, therefore, is a denial of due process of law.

Moreover, in this particular case, it is a discrimination against these appellants; for the law of North Carolina, as shown, prescribes that trial courts must, when requested, charge on such presumption. A refusal so to do, on request, is to deny the particular defendant the equal protection of the laws. It will not do to say that full instructions were given the jury in this case on reasonable doubt, for, as shown above, and as expressly held in the Coffin case, the two are not equivalent terms; and that a defendant may have that full measure of justice given him which the law commands, the charge to the jury must embrace both propositions.

7. *The indictment charges no offense whatever. It is therefore* (a) ***not due process of law; and*** (b) ***it is a denial of the fundamental right of every American citizen to be informed of the nature of the accusation against him.***

(a) It is not due process of law.

Conceding for the sake of argument that at common law there are various combinations outside of the Edwardian Statutes which are criminal; conceding that among them is the offense of conspiring by certain kinds of false pretenses to cheat and defraud another; yet this indictment fails to change any such offense, and a conviction thereon is not due process of law.

We are well aware of the line of decisions of this Court which hold that the Federal Courts will not interfere with State rulings in matters of procedure, or in matters touching the frame of the indictment, or a change in the constitution of a State Court, or a change in the jury system, or the abrogation of the grand jury. These are but matters of form covered by local statutes. But the question

here involved lies deeper and is far more serious. "An "illustration is no argument," says Tristram,—"nor do I "maintain the wiping of a looking-glass clean to be a "syllogism;—but you all may, if it please your worships, "see the better for it." As an illustration, then, suppose a citizen of the United States were indicted for imagining the Governor's death and the State Supreme Court were to decide that the offense was covered by the usual statute defining murder, and sustain a death sentence; or suppose an indictment charging murder generally, with no time, place, weapon, intent, malice or prepence or name or description of the person killed alleged; would this Court hold either "due process of law?" Strip the count of this indictment on which defendants were convicted of its verbiage, and it charges simply a conspiracy by false pretenses to cheat and defraud Garrett. Even Judge Clark admits this insufficient for he concedes that defendants were entitled to a bill of particulars (312 Tr., 17), and states what is not in accordance with the truth or the facts in the record that defendants "were in full "possession of all the information which a bill of particu- "lars could have furnished them." Let us pause for a moment to examine this statement. The first count charges a conspiracy to cheat Garrett by false pretenses, and no more; the second, a conspiracy to assault Garrett, put him in fear of his life and thus feloniously "to steal, "take and carry away" his money from his person; the third, a conspiracy to cheat and defraud Garrett by the false pretenses that defendants owned mining interests and "large blocks of gold," *nothing more*. The last two counts were *nolle prossed*, with the reservation that they might "be referred to as furnishing particulars" (312 Tr., 106). The evidence was all directed towards proving

the notion that the combination was to defraud Garrett by some undefined false representations; the theory of robbery was not touched on; and the facts adduced fairly considered, were entirely consistent with the theory that the plan was to persuade Garrett to come into the combination and afterwards to cheat some one else. Now, under such circumstances to say that the two counts *nolled* gave defendants full information is a ruling:

> "That palters with us in a double sense,
> That keeps the word of promise to our ear,
> And breaks it to our hope."

It is simply not true that defendants had full information, as Judge Clark says; and as to this, we put ourselves upon the record. How, then, were defendants apprised of the charge against them? Not by the indictment and not by the bill of particulars, so-called.

Were they to prepare to meet a conspiracy to assault and rob Garrett? If the second count furnished the particulars, then were they tricked, not by the State's solicitor, but by the Court itself. If they relied on the third count, then no false pretenses whatever were set out, and no defense necessary, and again they were tricked.

The Constitution of North Carolina provides: "In all "criminal prosecutions, every man has the right to be "informed of the accusation against him." Art. I., sec. 11. By § 1183 (1 Code N. Car., 1883) it is provided: "Every criminal proceeding by warrant, indictment, in- "formation or impeachment shall be sufficient in form for "all intents and purposes, if it express the charge against "the defendant in a plain, intelligible and explicit man- "ner; and the same shall not be quashed, nor the judg-

"ment thereon stayed, by reason of any informality or "refinement, if in the bill or proceeding sufficient matter "appears to enable the Court to proceed to judgment."

On the one hand it is plain that the indictment does not fulfill the constitutional provision; nor, on the other, is it cured by § 1183, *supra.*

The rule of law, now believed to be universal in this country and England, is that an indictment charging a conspiracy to cheat and defraud, without more, is fatally defective; or else so defective as that a bill of particulars is matter of right and it is fatal error to refuse it. *King* v. *Gill,* 2 B. and Ald. 204; *Rex* v. *Hamilton,* 7 C. and P. 448; *State* v. *Parker,* 43 N. H. 83; *Comm.* v. *Eastman,* 1 Cush. 189; *Comm.* v. *Wallace,* 16 Gray 221; *Lambert* v. *People,* 9 Cowen 578; *Alderman* v. *People,* 4 Mich. 414; *People* v. *Barkelow,* 37 Mich. 455 (Cooley, C. J., and Campbell, J., were then on the bench; and the opinion contains a strong statement by the latter as to the reasons on which such vague pleading is condemned). *State* v. *Stevens,* 30 Iowa 391; *Hartman* v. *Comm.,* 5 Barr. 60; *Williams* v. *Comm.* 34 Pa. St. 178. (In this last case the fustian indulged in by some most respectable Courts about the secrecy of the offense and other mysterious and esoteric qualities is exposed. The offense "can be as readily "*laid* as proved," says the Pennsylvania Court.) *State* v. *Crowley,* 41 Wisc. 271; *State* v. *Cardoza,* 11 S. Car. 195; *State* v. *Mayberry,* 48 Me. 219; *U. S.* v. *Walsh,* 5 Dill. 58. (In this case Judge Dillon gives an excellent review of the cases, and repudiates the English doctrine as announced in the Gill case, *supra.*) *Comm.* v. *Ward,* 92 Ky. 158; *State* v. *Keach,* 40 Vt. 113.

In those jurisdictions where the vague indictment is

upheld, a bill of particulars is awarded. *McDonald* v. *People*, 126 Ill., 150; *State* v. *Brady*, 107 N. Car., 822.

The argument that this Court will not consider as Federal any question which involves a State's ruling on its internal police will doubtless be urged. There is no adjudication by this Court either for or against the proposition, on the application of a non-statutory *general rule of substantive criminal law* of the several States considered in connection with the inhibition of the XIV. Amendment. The rulings thus far are only on the *adjective*, and substantive law embraced in statutory enactments and the interpretation thereof by State tribunals. As to these the Court say there are no Federal questions, since each State is supreme in that province. But a strong argument can be made from analogy. And first let it be noted that this Court is and always has been sedulous to protect citizens of the United States in their *property* rights against unwarranted encroachments by the States. We need do no more than refer to the exhaustive opinion of Mr. Justice Brewer in *Cotting* v. *Godard*, 183 U. S. 79. Will the Court be less solicitous to protect a citizen's liberty than his property? "Next in degree to the right of per-"sonal liberty is that of enjoying private property without "undue interference or molestation," says Mr. Justice Harlan in *Chicaga, B. & Q. R. R.* v. *Chicago*, 166 U. S. 226, quoting from Broom Const. Law, 228. The English law has at times been much criticised for placing a higher value on mere property than on life or liberty; our Court puts the matter on the right basis.

Now, regarding mere property rights this Court has refused to follow State adjudications on the rules of Equity, on the rules of the Law Merchant, on the prin-

ciples of Admiralty Law. *Bucher* v. *Cheshire R. R.*, 125 U. S. 555; *Swift* v. *Tyson*, 16 Pet. 1; and numerous other cases.

In *Boyce* v. *Tabb*, 18 Wall. 546, it was held that contracts relating to slaves, valid when made, are nevertheless valid though afterwards held void by the Supreme Court of the State as against public policy. The Court say in effect that the provisions of the Judiciary Act do not require Federal Courts to follow State decisions on such questions. Those provisions do not apply to questions of "a general nature, not based on a local statute "or usage, nor on any rule of law affecting titles to land, "nor any principle which had become a settled rule of "property." The State decisions on the excepted matters are highly persuasive, but not conclusive.

In *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555, Mr. Justice Miller comments on and defines § 721 of the Judiciary Act, and states there is nothing in the act which requires Federal Courts to follow State decisions on questions of equity or admiralty. The learned Justice cites *Swift* v. *Tyson*, 16 Pet. 1, which makes the same ruling as to the general principles of commercial law. The classes of cases in which he says the Federal Courts are bound by State decisions include all interpretations of State constitutions and statutes; decisions, whether founded on statutes or not, which have laid down rules of property; decisions establishing rules of evidence; and the common law, in actions at law. As to this last, the Court say, difficulties arise.

"It may be said generally that wherever the decisions "of the State courts relate to some law of a local char- "acter which may have become established by those

"courts, or has always been a part of the law of the State, "that the decisions upon the subject are usually conclu- "sive, and always entitled to the highest respect of the "Federal courts."

There is nothing in the language of sec. 721 of the Judiciary Act which holds the Federal Courts bound to follow State decisions on general principles of the common law of crimes; and there are assertions of principles by this Court in various cases which go far to show that it will not be bound by such decisions.

In *Swift* v. *Tyson*, 16 Pet. 1, the Court makes the well-known distinction between statutory law and the law as announced by the courts; the latter being only the evidence of what the laws are, and if found defective or ill-founded, may be reëxamined and a different rule announced. Considering then sec. 34 (now § 721) of the Judiciary Act, the Court say that the true interpretation of that statute is that it embraces only the statutory laws of the given State, the interpretations thereof by its courts, and to rights and titles to immovables. To these enumerated classes the term "State laws strictly local" is applied; as to all others the reasoning of the Court leads to the conclusion that the Federal Courts are not at all bound by State adjudications. It would seem to follow necessarily from this that if there is any such thing in Anglo-Saxon law as a general principle of criminal law, this Court is not bound by the decisions thereon of the State tribunals. There are many decisions of this Court holding that while there is no such thing, strictly speaking, as a common law of the United States, yet when an Act of the Congress uses a term of common law origin, the courts of the United States will have recourse to the common law for a definition of such term.

If there be a question of murder on the high seas, the courts of the United States look at once to the common law for the ingredients of murder, and they find there that there must be intent, malice prepense, deliberation. If the question be the negotiability of a bill of exchange, recourse is had to the law merchant for the requisites of negotiability. Is the one a more general principle than the other? If the State Court should hold a transfer of a bill of exchange in good faith, for value and without notice before maturity did not pass title, this Court would decline to follow the ruling. Is it any more bound in the absence of a State statute to follow an erroneous ruling on a general principle of criminal law?

The point here insisted on is that the indictment in this case charges a criminal conspiracy; but there is no State statute defining that offense, and hence the State Courts of necessity must go to the common law for the definition, and the indictment must contain all the essential ingredients of the crime, as there defined. Admitting for the moment that a conspiracy to cheat and defraud by false pretenses is a common law crime, then the State must allege that crime in terms of the common law. By all the authorities, either in the indictment or the particulars furnished the defense when demanded in apt time, the prosecution must set out the false pretenses, and they must be either false weights or false measures or false tokens, or else no crime whatever is charged. The State in this instance has failed to charge a common law crime in terms of the common law; and hence it has charged no crime at all. If it has charged no crime at all, then this prosecution is not due process of law.

(b) It is a denial of the fundamental right of the citi-

zen to be informed of the nature of the charge against him.

But a far stronger reason exists why this Court should, on this branch of the case, discharge the prisoners.

In failing to charge any crime in the indictment and in incarcerating defendants below on a sentence based on such defective indictment, the State has invaded the fundamental right of the citizens of the United States to be informed of the accusation against them, and has, in addition, deprived them of their right not to be a second time put in jeopardy for the same offense.

Under the vague allegation of "false pretenses" in this indictment, how could defendants prepare their defense? A hundred different changes might be rung on the false pretenses. And, more important still, how could defendants plead former conviction. Suppose a new indictment to be framed on a conspiracy to cheat Garrett by selling him a salted mine; or by selling him bars of copper as and for gold bars, the conviction in this case would be no bar to either. Is it not a fundamental right of every American citizen that he shall not twice be tried for the same offense? And this irrespective of State or Federal Constitutions or Statutes? Does not this proposition come fairly within the ruling of this Court in *Loan Ass'n.* v. *Topeka*, 20 Wall., 655, 662? No court has gone further than this Court in upholding the rule of pleading which requires an indictment to fully state the crime, so that defendant may be apprised of the accusation against him, and be ready to meet a second charge for the same offense. *U. S.* v. *Cruikshank*, 92 U. S. 542; *U. S.* v. *Mills*, 7 Pet., 138. In *U. S.* v. *Cook*, 17 Wall., 168, this Court say: "Every ingredient of which the offense is "composed must be accurately and clearly alleged."

Is the State absolutely omnipotent in criminal matters within its boundaries? If so, it is a strange omission in our Federal Constitution. Property rights are carefully guarded from arbitrary action by the State, but the lives and liberty of citizens of the United States are absolutely at its mercy. If this be true then a State may lodge in its chief executive the power to issue *lettres de cachet;* it may re-establish the ordeal, the wager of battle, amputation of members, the old punishment for high treason, the *peine forte et dure;* the only limitation being that all alike must be subject to the new laws.

We submit this cannot be the law; and we are not without cogent authority and reason on the subject.

In *Brown* v. *New Jersey,* 175 U. S., 172, it was held that a trial of a defendant in a criminal action in a state court by a struck jury is not a violation of XIV. Arndt. and is due process of law.

"The state has full control over the procedure in its "courts, both in civil and criminal cases, subject only to "the qualification that such procedure must not work a "denial of fundamental rights or conflict with specific and "applicable provisions of the Federal Constitution." By Mr. Justice Brewer, citing *ex parte* Reggel, 114 U. S., 642; *Iowa C. R. Co.* v. *Iowa,* 160 U. S., 389; *Chicago, B. & Q. R. R. Co.* v. *Chicago,* 166 U. S., 258.

The Court here makes two classes of rights, namely: "fundamental rights" and rights secured by the express language of the Federal Constitution. In other cases similar language is used. *In re* Kemmler, 136 U. S., 436, the Court speaks of "those fundamental principles of "liberty and justice which lie at the base of all our civil "and political institutions." This statement is made in

a criminal cause and in reference to the liberty of a citizen. The language is taken directly from the leading case of *Hurtado* v. *State*, 110 U. S., 516. In this last case, the Court quotes with approval the celebrated opinion of the late Mr. Justice Miller in *Loan Assn.* v *Topeka*, 20 Wall., 655, 662. There are certain rights, says that learned jurist, "in every free government beyond the "control of the state. A government which recognized "no such rights, which held the lives, the liberty and the "property of its citizens subject at all times to the abso- "lute disposition and unlimited control of even the most "democratic depository of power, is after all a despot- "ism."

In *Holden* v. *Hardy*, 169 U. S., 366, it is said: "This "Court has never attempted to define with precision the "words 'due process of law,' nor is it necessary to do so "in this case. It is sufficient to say that there are certain "immutable principles of justice, which inhere in the very "idea of free government, which no member of the Union "may disregard, as that no man shall be condemned in "his person or property without due notice, and an op- "portunity of being heard in his defense."

What are these "immutable rights," these "fundamental rights," which lie at the base of all our * * * institutions?" Unquestionably this Court will not attempt any precise definition, but will properly leave each case to be decided on its special facts. But it is submitted that one of those rights is the right of every man to be told of the nature of the charge against him. Can a state deprive a man of this right? If so, then as pointed out above, a state can punish a man as often as it pleases for the same offense. There is no escape logically from

this conclusion. It will not do to answer this by saying the state rule bears on all alike; for we invoke a different principle; we invoke the principle that every man, woman child in this broad Union, citizen, denizen or alien, has the indefeasible right to be informed of the accusation against him or her, and to be protected from further prosecution for the same offense by the plea of former conviction or former acquittal.

Perhaps these rights are included within the "priv-"ileges and immunities of citizens of the United States." No precise definition of this phrase has been attempted, but in numerous decisions this Court has enumerated certain of these "privileges," while in other cases it has held certain claimed rights not to be within the meaning of the provision.

In *Maxwell* v. *Dow*, 176 U. S., 581, it was held that the rights secured by the first eight amendments to the Federal Constitution were not necessarily privileges and immunities of citizens of the United States, as such; and hence these rights are not carried bodily into the 14th Amendment and thus made effective as against the several states. As to what these privileges and immunities consist in, the opinion quotes very largely from the Slaughterhouse Cases, 16 Wall., 36, and from the opinion of Mr. Justice Washington in *Corfield* v. *Coryell* (4 Wash., C. C., 371; S. C. Fed. Cas. No. 3230). Without attempting to define all these "privileges" Mr. Justice Miller enumerates the following: Free ingress and egress to and from any state; all privileges of trade and commerce allowed the citizens of any state; all privileges that are *fundamental*, which belong of right to the citizens of all free governments, and which have at all times

been enjoyed by the citizens of the several states, including protection by the government, the enjoyment of life and liberty with the right to acquire and possess property and to pursue and obtain happiness and safety, subject to state provisions for the general good; to go to the seat of government and assert claims or transact business; to seek the protection of the government; to share its offices; free access to seaports and to its various offices throughout the country; access to the courts of the several states; protection of the government on the high seas or within the jurisdiction of foreign governments; to assemble peaceably with others to petition for redress of grievances; the right to the writ of habeas corpus; to use navigable waters of the United States within state limits; rights of citizens secured by treaty; to become a citizen of any state; rights secured by Amendments XIII. and XV.; to bring actions in state courts; to keep and bear arms to the extent necessary to preserve to the federal government its resource to maintain the public security.

Per contra, the following have been held not to be such privileges and immunities; to practice law in state courts; women suffrage; trial by jury in state courts in suits at common law; the rights reserved by the Fifth and Sixth Amendments, since these are not rights peculiar to citizens of the United States, but are secured to all persons irrespective of citizenship; the property right to take fish in the waters of a state; indictment by grand jury or trial by jury, as at common law, in criminal cases; the prohibition of cruel and unusual punishments; for the state to adopt rules of judicature different from the course of common law, provided those rules are uniform as to classes (not purely arbitrary) in the state.

Maxwell v. *Dow, supra; Bradwell* v. *Illinois*, 16 Wall., 130; *Minor* v. *Happersett*, 21 Wall., 162; *Cole* v. *Cunningham*, 133 U. S., 107; *Blake* v. *McClung*, 172 U. S., 239; *U. S.* v. *Cruikshank*, 92 U. S., 542; *Re* Kemmler, 136 U. S., 436; *Walker* v. *Sauvinet*, 92 U. S., 90; *Doe ex dem. Murray* v. *Hoboken, etc.*, 18 How., 280; *Presser* v. *Illinois*, 116 U. S., 252; *O'Neil* v. *Vermont*, 144 U. S., 323; *Thorington* v. *Montgomery*, 147 U. S., 490; *Missouri* v. *Lewis*, 101 U. S., 22.

Again we meet the expression "privileges that are fun- "damental, and which have at all times been enjoyed by "the citizens of the several states, including * * * "the enjoyment of life and liberty * * * subject to "state provisions for the general good." Thus on the one hand as protected by the XIV. Amendment we have certain constitutional and certain additional rights which are fundamental, and these are protected; on the other, we see certain forms of procedure and certain limitations on the Federal Government which are not the peculiar privileges of its citizens, and these are not protected.

By pursuing this other route, we have arrived at the same destination. Is the right to be informed of the nature of the accusation against one "fundamental"? In this right is inextricably bound up that other right that no person shall be twice tried for the same offense. Is not this a fundamental right? These defendants were denied such rights by the Courts of North Carolina. Will this Court uphold that denial?

An argument "on the inconvenience" may be urged against this Court entertaining this case; and it may be said that such action would open wide the doors of Federal Courts to all defendants in state prosecutions. Not

so. So unique a case as this may not arise again in half a century. The criminal law in practically all the states is reduced to a code. The few common law offenses are almost entirely classed as misdemeanors punishable with short jail sentences or small fines. The chance of another case presenting the questions here invoved is practically nil. But even were it not so, inconvenience cannot prevail against the law.

All of which is respectfully submitted.

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